Philipp Ebert

St Edmund's College

University of Cambridge

Socialist State Crime and Transitional Justice in Germany, 1961-2005

September 2019

This dissertation is submitted for the degree of

Doctor of Philosophy

Preface

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

CAMBRIDGE, 30 SEPTEMBER 2019 PHILIPP EBERT

Dissertation Summary

Philipp Ebert (St Edmund's College, Cambridge)

'Socialist state crime and transitional justice in Germany, 1961-2005'

Date of Submission: September 2019

Re-unification posed multiple challenges to the societies, economies, and polities of East and West Germany. On a political, legal, cultural and symbolic level, strategies needed to be found to incorporate the divided – and potentially divisive – past into a forward-looking historical narrative. This study locates the 'border guard trials' in the wider context of post-Socialist transitional justice in East Germany since 1989 and asks how they were historically framed by the complex history of German attempts of '*Vergangenheitspolitik*' (Norbert Frei) with regard to Nazi crimes. Moreover, this dissertation examines how the criminal proceedings were ideologically shaped by Cold War confrontations, and how competing conceptions of illegality and state crime mirrored those ideological and historical contestations. In studying the political and societal echoes of these criminal trials, my study finally also contributes to a better understanding of fractured views on and memories of German re-unification in contemporary Germany.

In chapter 1, the *Zentrale Erfassungsstelle der Landesjustizverwaltungen* will be portrayed as an institutional embodiment of West German contestations of the legitimacy and legality of the German Democratic Republic (GDR) and its border regime during the Cold War. In chapter 2, legislative proceedings of 1992/93 are examined as a proxy debate on the appropriateness and legitimacy of criminal trials against former GDR officials. Chapter 3 studies the brief period of East German transitional justice between November 1989 and October 1990 and argues that criminal trials against former elites were widely demanded by East German citizens. Chapter 4 analyses the border guard trials as a case study into judicial practice, its limits, and its achievements, and contrasts them with the proceedings presented in the previous section. Chapter 5 explores societal echoes of the trials and explores why and how they largely failed to give legitimacy to the new political, social, and economic order.

Table of Contents

Introduction.....1

1. Setting the Frame: Law, Politics, and the power of historical continuities, 1961-1989 44
2. Seeking Justice, Enabling Reconciliation: Public Debate and Political Decision-Making, 1989/92-1997.....81
3. Criminal Prosecution in the Late GDR, 1989-1990 137
4. Judicial practice after reunification: the case of the border guards trials, 1991-2005 156
5. Transitional Justice and Public Opinion 216

Conclusion 255

Sources and Bibliography *266*

Abbreviations *287*

Acknowledgements *288*

Introduction

Chris Gueffroy's dream of driving across the Golden Gate Bridge in San Francisco came to a sudden end on the night of 5 February 1989 at the Berlin Wall in the city's district of Treptow. Just before midnight, a bullet from a Kalashnikov rifle pierced his heart, just as the twenty-year-old was helping his friend Christian Gaudian to climb the final fence of the Berlin Wall. Gueffroy collapsed immediately and Gaudian, even though only his foot had been hit by a bullet, fell to the ground. Gueffroy died instantly, while Gaudian was captured and later sentenced to prison. Like hundreds before them, they saw their attempt to flee the German Democratic Republic (GDR) ending in a hail of bullets.[1]

In May 1991, less than a year after German re-unification, Gueffroy's slayer Ingo Heinrich and his border guard comrades were charged with manslaughter. Two of the four men were eventually given prison sentences, one of which was suspended. In its decision, the *Landgericht* Berlin argued that any regulation which allowed for the use of fatal weapons to prevent the illegal crossing of the border 'deserved no respect, and that obedience to this regulation had to be refused.' In the eyes of the court, killing a citizen for the sake of securing the existence of the GDR's 'totalitarian system' constituted a grave violation of 'fundamental principles of law and humanity.'[2]

The verdict in the *Gueffroy* case provoked huge opposition. Approximately forty citizens felt prompted to write letters to the Federal President Richard von Weizsäcker, asking him to pardon the convicted. Commentators in newspapers

[1] Ahonen, Pertti: Death at the Berlin Wall, Oxford: Oxford University Press 2011, 240-251.
[2] Erstinstanzliches Urteil des Landgerichts Berlin vom 20.1.1992, Az. (523)2 Js 48/90 (9/91), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 5-70, [p. 53].
.

feared that the verdict was a case of hanging the small men and letting the big men run (see chapter 9). For the PDS, the political successor of East Germany's state party SED, this was a telling incident of victor's justice. In March 1992, after the first two verdicts against border guards had been handed down, the PDS claimed that the history of the GDR could not be told without coming to terms with 'the history of German National Socialism and capitalism, German division by the allied forces and the West German capital.' This suggested link between National Socialism and the GDR was an exculpatory claim of former GDR elites and their latter-day acolytes in the PDS, claiming that the GDR's aim was to curb and root out fascism. However, the link was twofold, as this study will show, as post-socialist transitional justice after 1989 also took place in the shadow of the precedent of West German efforts to 'come to terms' with the Nazi past.

With the path of transitional justice the country had chosen – at this stage, this clearly had to be understood as a reference to the first two border guard cases – the PDS feared, any 'critical and emancipatory potential of the GDR' was supposed to be dissolved and rendered ineffective.[3] However, the verdicts also attracted ringing endorsements. Two years later, after the Federal Constitutional Court had confirmed prison sentences against members of the GDR's National Defence Council (NVR), a press comment hailed the verdicts against the former leaders as 'a prime example of the only correct way to come to terms with the past in Germany' and thought that the ruling was a decisive step 'on the way to the final realisation of Germany's inner unity.'[4] It is indicative of the centrality and sensitivity of these cases that debates about how to deal with the Communist

[3] ADN-report, ‚PDS-Vorstand: Deutsche Geschichte kritisch aufarbeiten', March 1992, BArch B141 / 116719.

[4] 'Musterbeispiel für einzig richtigen Weg der Vergangenheitsbewältigung in Deutschland' , 'nicht zu unterschätzender Schritt auf dem Weg zur endgültigen Verwirklichung der inneren Einheit Deutschlands', both quotes from: Jörg Respondek, 'Denkwürdige Urteile in Berlin', in: Oldenburgische Volkszeitung, 27 July 1994.

dictatorship's legacy, which were always also about the current political culture and future direction of reunited Germany, tended to crystallise around them.

Re-unification posed multiple challenges to the societies, economies, and polities of East and West Germany. On a political, legal, cultural and symbolic level, strategies needed to be found to incorporate the divided – and potentially divisive – past into a forward-looking historical narrative. This study locates the 'Border Guard Trials' in the wider context of post-socialist transitional justice in East Germany since 1989 and asks how they were historically framed by the complex history of German attempts of '*Vergangenheitspolitik'* (Norbert Frei) with regard to Nazi crimes. Moreover, this dissertation examines how the criminal proceedings were ideologically shaped by Cold War confrontations, and how competing conceptions of illegality and state crime mirrored those ideological and historical contestations. Finally, in studying the political and societal echoes of these criminal trials, my study also contributes to a better understanding of fractured views on and memories of German re-unification in contemporary Germany.

How is this research project original? It is the first historiographical study to link the Border Guard Trials, and criminal proceedings against former GDR officials more broadly, to the conceptual field of transitional justice. It explores societal and political reverberations of the proceedings, and describes how and why the trials have failed to give legitimacy to the new political, social and economic order. Moreover, it is the first extensive historiographical interrogation of court judgements in the Border Guard Trials which studies how courts have tried to accommodate the tensions inherent in transitional justice processes. Lastly, it is the first anglophone research project that studies how the proceedings were foreshadowed and shaped by the ideological confrontations of the cold war, and how the trials were related to the history of German efforts to 'come to terms' with the Nazi past.

The *Gueffroy* case[5] marked the first of the so-called border guard cases. Between 1991 and 2005, 466 persons were charged with manslaughter or murder for firing fatal shots at the Berlin Wall or the Inner German border during the forty years of German division (1949-1989/90). Of those, 275 were convicted, usually of manslaughter, rarely of murder.[6] These trials formed a part of a larger series of criminal investigations and trials against former officials of the German Democratic Republic (and in rare cases other persons). After German reunification, 75,000 criminal investigations were launched against approximately 100,000 persons. Most cases were closed at an early stage. During these fourteen years from 1991 to 2005, 1,737 individuals were officially charged in 1,021 trials. Of these, fifty-four per cent were officially convicted, just under one quarter of defendants were acquitted. As for the remaining defendants, the cases had to be closed, often due to poor health or insufficient evidence. This means that every 133rd person of those 100,000 accused individuals was eventually convicted and sentenced.[7]

The above-mentioned *Gueffroy* case was undoubtedly the first trial of a former GDR border guard. But it was by no means the first trial of any former GDR official. Criminal investigations against former state and party leaders of the GDR were launched within weeks of the fall of the Berlin Wall on 9 November 1989. From that time until German reunification on 3 October 1990, at least 124 criminal investigations were launched. The focus of these proceedings was exclusively on cases of voter fraud and crimes like corruption or abuse of office. The latter two categories of crime predominantly referred to claims that former GDR elites had misappropriated public funds for personal use. During these eleven months, fifteen persons were convicted, and another eleven individuals received penalty orders.

[5] In cases with individual victims, their names will be used through this study as an identifier for the trial in question.
[6] For comprehensive statistics, see Marxen, Klaus/Werle, Gerhard/Schäfter, Petra, Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen, Berlin 2007, esp. pp. 54-57.
[7] ibid.

Numerous other investigations were later continued by re-united Germany's state prosecutors, or judgements delivered in the late GDR served as a basis for later court proceedings after reunification. Therefore these trials, small as their number may seem at first glance, were hugely important: they expressed the will of GDR state prosecutors to hold former elites to account and recorded their firm belief that not everything that former leaders had done was automatically legal or legitimate.[8] Criminal prosecution of former GDR officials therefore can be divided into two periods: the early phase of trials against former elites for economic crimes and voter fraud (November 1989 – October 1990) and the much longer period (1990 – 2005) of comprehensive trials for a broader variety of crimes, including border-related violence, abuse of justice, and espionage of the GDR's secret service *Stasi* (Amt für Staatssicherheit).[9]

Any transformation on the scale which East Germany experienced poses multiple challenges to a body politic and a society. It has been argued that in ancient times, forced oblivion or comprehensive gesture of 'forgive and forget' were common strategies at the end of internal conflicts or wars.[10] With the development of international humanitarian law since the nineteenth century, a stronger emphasis has been put on the legality – and potential illegality – of certain acts in conflicts. The Nuremberg and Tokyo trials of the late 1940s and the gradual development of a system of international criminal law since then clearly mark that the idea of bringing perpetrators of grave war-crimes to court has had its breakthrough in the past century.[11]

---

[8] ibid., 54 and 11-14.

[9] ibid.

[10] Meier, Christian: Vom Gebot zu Vergessen und der Unabweisbarkeit des Erinnerns. Vom öffentlichen Umgang mit schlimmer Vergangenheit, Siedler: München 2010; Connerton, Paul: *'Seven types of forgetting',* in: Memory Studies 1 (2008), pp. 59-71.

[11] von Lingen, Kerstin: 'Crimes against Humanity'. Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864-1945, Paderborn: Ferdinand Schöningh 2018; Weinke, Annette: *Vom '"Nie wieder" zur diskursiven Ressource. Menschenrechte als Strukturprinzip internationaler Politik seit 1945'*, in: Frei, Norbert / Weinke, Annette (eds.): Toward a New Moral World Order?

The 1989 moment gave birth to 'transitional justice', a legal term intended to capture system transformations in a broad array of contexts, including the former GDR. Different ways of addressing violent pasts were chosen in Central and Eastern European countries, in South America and post-Apartheid South Africa.

Transitional justice (TJ) has since been used both as a normative or prescriptive concept and as an analytical category. If used in an analytical way, it might even be used retrospectively in analysing transformative processes *avant la lettre.*[12] The ultimate aim of transitional justice (if used in such an anachronistic way) is to ensure peace by securing a new regime and equipping it with legitimacy and popular support. This forward-looking aim of transitional justice potentially entails certain backward-facing means, such as identifying perpetrators of an old regime and punishing them for the sake of restoring justice and de-legitimising the old order.[13] Measures deployed towards this aim often include, but are not limited to: criminal trials or tribunals; lustrations of public services; public acknowledgements of guilt and suffering; reparations and rehabilitations; amnesties; truth and reconciliation commissions, and many more.[14]

After the demise of the GDR, a wide array of transitional justice tools was deployed in Germany's efforts of '*Vergangenheitsaufarbeitung',* to use the contemporary term. Expropriated properties were restituted to their former owners (or their heirs), the civil service was extensively lustrated, the files of the secret

---

Menschenrechtspolitik und Völkerrecht seit 1945, Göttingen: Wallstein 2013, pp. 12-39; Bauerkämper, Arnd: Die lange Debatte über 'Crimes against Humanity'. Völkerrecht, die Rolle von Experten und zivilgesellschaftliche Mobilisierung, in: Neue Politische Literatur 63 (2018), No. 3, pp. 377-384; Meier, Gebot; Elster, Jon: Closing the books. Transitional Justice in historical perspective, Cambridge: Cambridge University Press 2004.

[12] Weinke, Annette: *Die Bundesrepublik Deutschland – ein Fall von Transitional Justice avant la lottre?,* in: Mihr, Anja / Pickel, Gert / Pickel, Susanne (eds.), 'Handbuch Transitional Justice. Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie, Wiesbaden, Springer 2019, pp. 249-274.

[13] Mihr, Anja / Pickel, Gert / Pickel, Susanne, 'Einführung in Transitional Justice', in: Mihr, Anja / Pickel, Gert / Pickel, Susanne (eds.), 'Handbuch Transitional Justice. Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie, Wiesbaden, Springer 2019, 3-23 (p. 7f.).

[14] ibid.

service *Stasi* were made accessible for the public and former political prisoners were rehabilitated. This was flanked with symbolic steps such as the re-naming of buildings, squares and streets, public ceremonies on the anniversaries of the fall of the Wall and German reunification, and by removing socialist memorials from the public sphere.[15] As we can see, criminal justice against former GDR officials was merely one tool of post-socialist transitional justice in re-united Germany. But it was a crucial measure that linked criminal judgements in individual cases to historical, legal, and political contestations of the Cold War, and to transformative experiences after re-unification.

Hence, criminal trials, and the Border Guard Trials more particularly, will form the focus of this dissertation. When writing the history of such criminal trials, it is important to understand them not as a dimension of human life that is opposed to or sealed off from other spheres such as politics, culture, or society. Rather, *the law* has to be understood as an aspect of human life that is deeply intertwined with politics, culture and society. It is, in many ways, their product – but it also shapes these dimensions of human life. Studying criminal trials against former GDR officials therefore necessarily implies understanding these proceedings in a legal, political, social and/or cultural way and to ask how these dimensions of the trials are intertwined and intermingled.

This study aims to historicise criminal trials against former GDR officials as a political, legal, and social subject. More precisely, it will be asked how these trials emerged as a product of politics, law, and society, and, conversely, what ramifications and repercussions these trials had in the spheres of politics, society,

[15] Simon, Vera Caroline: 'Tag der Deutschen Einheit: Festakt und Live-Übertragung im Wandel', in: Aus Politik und Zeitgeschichte 2015, B 33-34, pp. 11-17; Saunders, Anna : 'The Politics of Memory in Berlin's Freiheits- und Einheitsdenkmal', in: Saunders, Anne / Pinfold, Debbie (eds.): Rembembering and Retinking the GDR. Multiple Perspectives and Plural Authenticities, Houndsmills: Palgrave Macmillan 2013, pp. 164-178; Griffins, Courtney Glore: 'Reinterpreting the Soviet War Memorial in Berlin's Treptower Park after 1990', in: Clarke, David / Wölfe, Ute (eds.): Remembering the German Democratic Republic. Divided Memory in a United Germany, Houndsmills: Palgrave Macmillan 2011, pp. 54-64.

and the law. Lastly, it will also be important to examine what sort of frictions between these societal dimensions surrounded the trials, and how relevant actors have responded to these tensions or tried to reduce them.

In service of this aim, this study will explore the origins of post-socialist criminal trials in West German legal practice between 1961 and 1989, and in East German judicial practice between the fall of the Berlin Wall in November 1989 and German re-unification in October 1990. I will then move on to study legislative initiatives in the early 1990 which secured continued criminal investigations for an exceptionally long period of time, as well as political debates which served as a proxy political justification for the chosen path of transitional justice. I will then turn to judicial practice and ask how the judiciary attempted to develop a coherent and legally waterproof jurisprudence that also – at least to a minimal extent – satisfied expectations from the public and political sphere. Lastly, this study will explore how the public sphere (both journalists and the wider public) viewed criminal trials as such, as well as specific jurisprudence in the context of transitional justice, and to what extent jurisprudence might have satisfied – or not – the public's expectations.

In the case of criminal trials against former GDR officials, the criminal law was used to regulate inherently political questions. It will be shown that these trials were a de-centralised form of transitional justice which, in terms of how it was carried out, de-politicised the fundamental political question of such a transitional period: what to do with former regime perpetrators. As a transitional justice measure, the trials failed to equip the new political, social, and economic order with legitimacy or political support. Rather, despite the courts' various attempts to act in a way which accommodated popular expectations regarding the outcome of such trials, a majority of Germans – especially in the East – viewed the proceedings as a burden on German unity.

The courts, eager to accommodate public and political outcome expectations towards the trials, developed a jurisprudence that was sensitive to different levels of responsibility for state crimes. However, this jurisprudence failed to gain public support for a number of reasons: the jurisprudence was only developed over time and a taxonomy only became obvious in hindsight; moreover, courts were limited to the rules of the 'ordinary' law (as opposed to a revolutionary tribunal), and were limited by their role in communicating potentially political considerations which might have underpinned their judgements.

These shortcomings were due to the genesis of these trials. They were not a carefully considered expression of a unified and consistent philosophico-politcal position. Rather, they came to pass in an ad-hoc fashion, and were to an extent determined and constrained by the triple lines of continuity from (1) legal proceedings and political desires during the GDR's revolutionary period; (2) West German legal and ideological framings, and especially the collection of investigative files; and (3) historical efforts to 'come to terms' with the Nazi past.

* * *

My study integrates a historiographical examination of the law into political and social history, drawing on the pioneering theoretical suggestions of Siemens, Habermas and Suntrup.[16] Along these lines, law is understood as a 'fundamental dimension of historical analysis'[17] – rather than something separate from, let alone opposed to it. To situate my study of the wall-shooter trials historiographically requires a survey of four distinct albeit interrelated fields: the cultural history of law, the interdisciplinary research field of transitional justice, the history of post-

[16] Siemens, Daniel: *Towards a New Cultural History of Law,* in: InterDisciplines 3 (2012), No. 2, pp. 18-45; Habermas, Rebekka: Diebe vor Gericht. Die Entstehung der modernen Rechtsordnung im 19. Jahrhundert, Frankfurt a.M. / New York: Campus 2008; Sintrup, Jan Christoph: Umkämpftes Recht. Zur mehrdimensionalen Analyse rechtskultureller Konflikte durch die politische Kulturforschung (= Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 22), Frankfurt a.M.: Vittorio Klostermann 2018.

[17] Siemens, Cultural History of Law, 39.

socialist transitional justice in Germany, in the context of contemporary German history since 1990 more broadly; and, lastly, the history of (West) German efforts concerning *'Vergangenheitsaufarbeitung'* of the Nazi past.

Law and History

For some time, 'law' and 'history' as research fields have been separated. For instance, the historian Otto-Gerhard Oexle made a strong case for understanding legal history as a specific branch of history.[18] Social historian Hans-Ulrich Wehler has insisted that political rule, economy and culture are the 'fundamental dimensions' or 'axes' of a society. In Wehler's view, law was not among them.[19] They both viewed the law to be something that was factually separated from other social phenomena.

Especially legal historians (that is, trained lawyers) were among the early proponents of a more integrative approach towards history and law in recent decades. Stolleis asserted that a history of ideas could not be separated from a history of hard historical facts.[20] The former German Federal Constitutional Justice Dieter Grimm, emeritus professor of public law and a valued public intellectual, has crucially claimed that legal historians must get used to 'attributing the same relevance to starvation, religious schisms, and the invention of the steam engine as it normally does to the legal system of Savigny, the Magna Carta' and other legal phenomena.[21] Recently, this integrative approach of understanding 'the law' as an

[18] Oexle, Otto Gerhard: *Rechtsgeschichte und Geschichtswissenschaft,* in: Simon, Dieter (ed.): Akten des 26. Deutschen Rechtshistorikertages (Frankfurt am Main, 22 – 26 September 1986), Frankfurt a.M.: Vittorio Klostermann 1987, pp. 77-107.

[19] Siemens, Cultural History of Law, 24.

[20] Stolleis, Michael: Verfassungs(ge)schichten (= fundamenta Juris Publici, vol. 6), Tübingen: Mohr Siebeck 2017, pp. 32-38.

[21] 'Wirkungsgeschichtliche Untersuchungen weisen das Fach freilich über die Grenzen des genuin Juristischen endgültig hinaus. Die Forschung muß sich angewöhnen, einer Hungersnot, der Glaubensspaltung, der Erfindung der Dampfmaschine nicht weniger rechtshistorische Relevanz beizumessen als dem System Savignys, der Magna Charta oder dem Müller-Arnold-Prozeß. Gegenstandsadäquate und gegenwartsbezogene Rechtsgeschichte wird zur Sozialgeschichte',

analytical category and a historiographical research field has been fruitful in various fields of historiographical, including political history,[22] the history of knowledge,[23] the history of crime,[24] and when studying the 'performativity of law'.[25]

Grimm, Dieter: Recht und Staat der bürgerlichen Gesellschaft, Frankfurt: Suhrkamp 1987, p. 418 (translation from Siemens, Cultural History of Law, 23).

[22] Gehrig who argues that the GDR used domestic and international law to pressure West Germany into recognising the GDR's sovereignty during the Cold War, meaning the law has been used as a tool to facilitate politically desired outcomes, cf. Gehrig, Sebastian: '*Cold War Identities: Citizenship, Constitutional Reform, and International Law between East and West Gremany, 1967-75',* in: Journal of Contemporary History 49 (2014), No. 4, pp. 794-814. Duranti has shown how after the World War II, conservative political forces in France and Britain have advanced work on the European Convention of Human Rights out of fear of communism, resulting in political fears immediately fuelling legislative work. See Duranti, Marco: *'Conservatives and the European Convention on Human Rights',* in: Frei, Norbert / Weinke, Annette (eds.): Toward a new moral order? Menschenrechtspolitik und Völkerrecht seit 1945, Göttingen: Wallstein 2013, pp. 82-93.

[23] For an approach to include the law into the study of history of knowledge, see e.g. Wetzell, Richard F.: Inventing the Criminal: A History of German Criminology, 1880-1945. Chapel Hill: University of North Carolina Press, 2000.

[24] For examples of intriguing studies from the research field of history of crime, see for example Habermas, Rebekka: Diebe vor Gericht. Die Entstehung der modernen Rechtsordnung im 19. Jahrhundert, Frankfurt a.M. / New York: Campus 2008, who examines the transformation of Germany's legal order with respect to property or Wetzell, Richard F.: Crime and Criminal Justice in Modern Germany, New York: Berghahn Books, 2014, who includes perspectives on gender and sexuality in relation to crime.

[25] Studies into the 'performativity of law' include Grunwald, Henning: Courtroom to Revolutionary Stage. Performance and Ideology in Weimar political trials, Oxford: OUP 2012 as well as Jakiša, Miranda: *Postdramatischer Bühnen-Tribunal: Gerichtstheater rund um das ICTY*, in: Gephart, Werner et al. (eds.): Tribunale. Literarische Darstellung und juridische Aufarbeitung von Kriegsverbrechen im globalen Kontext (=Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 4), Frankfurt a.M.: Vittorio Klostermann 2014, pp. 223-242; also see Karahasan, Dževad: *Tribunal, Theater und das Drama des Rechts*, in: ibid., pp. 151-156; Sintrup, Jan Christoph: Einleitung – Über die rechtliche, kulturelle und literarische Bedeutung von Tribunalen, in: ibid., pp. 9-26; Brokoff, Jürgen: *Übergänge. Literarisch-juridische Interferenzen bei Peter Handke und die Medialität von Rechtsprechung und Tribunal*, in: ibid., pp. 157-172.

New historiographical approaches such as a 'new cultural history of law'[26] are based on the axiomatic assumption that 'the law' is not an anthropological (let alone ontological) category in itself, but is deeply intertwined with facets of human life such as politics, economy, culture, and society. This applies to 'the law' in all of its 'physical states', be it, for example, as a contested draft bill in legislative processes that reflects competing political aims; as statutory law regulating the property order, or as a tool of social discipline with respect to policing drugs and prostitution; debates about 'just' punishments of criminals, or references to professional legal language in pub banter. In all of these examples, 'the law' touches upon dimensions of human life such as politics, culture, economy or society. They reflect, as Siemens has put it, that 'even traditional legal ideas and practices are [deeply] grounded in spheres other than the law itself'[27] and therefore deserve close attention by historians. In his words, law is '(…) a complicated mixture of political action, legal reasoning, and social needs'.[28]

However, law is not only *a product* of society in a broad sense, but also an *influence* upon it. A legal system can be seen as 'a kind of societal self-definition, a definition that would both reflect and help define a society's moral values and the distribution of power and influence'.[29] Understood in such a way, law is 'transitive' and 'constructed in discourses' which reflect 'social structure' as 'facts', as Tomlin argues.[30] Law may therefore 'be regarded as a knowledge that records the play of social relations, but which also dynamically reproduces them in (…) institutions and ideologies'.[31] This entails that, although any legal order is a 'constantly

[26] Siemens, Cultural History of Law. Alternatively, Habermas speaks of 'anthropology of law', Habermas, Rebekka: Diebe vor Gericht. Die Entstehung der modernen Rechtsordnung im 19. Jahrhundert, Frankfurt a.M. / New York: Campus 2008, p. 19.
[27] Siemens, Cultural History of Law, 26.
[28] ibid., 23; Cf. Grimm, Staat und Recht, 413.
[29] Siemens, Cultural History of Law, 24.
[30] Tomlins, Christopher: *'Subordination, Authority, Law: Subjects in Labor History',* in: International Labor and Working-Class History *47 (1995)*, pp. 56-90, [p. 64].
[31] ibid., 64.

changing interplay of norms, actors and institutions',[32] legal systems usually purport to possess a certain static quality, a limited changeability, and an adherence to their own immanent rules and procedures. The most important rules are usually laid down in constitutions which themselves become part of identity politics and quests for allegiance.[33]

This constant negotiation has been described as 'Doing Law'.[34] Following this line of thought, criminal sanctions, and even the question of what is lawful and what is not, are permanently negotiated by various actors.[35] According to Habermas, this includes witnesses, those who report a criminal offence, defendants, prosecutors and judges, journalists, and politicians.[36] It needs to be added that the wider public also has to be seen as such an actor: as recipients of media coverage, as potential campaigners for changes to the legal system or – potentially – as a mob craving revenge, or as an electorate who could oust a sitting government if it fails to react to popular demands. Arguably, fear of such popular sentiments alone can motivate actors such as judges, politicians, or journalists to *refer* or to *defer* to a public's legal consciousness. Likewise, 'normative frameworks, procedural structures, interrogation methods, protocol types, legal trainings, [and] self-images of judge'

[32] 'sich ständig verändernden Zusammenspiel von Normen, Akteuren und Institutionen', Habermas, Diebe, 20.
[33] Gephart, Werner: Constitution as Culture. Constitutional Universalism and Pluralism of legal Culture (= Working Paper of the Käte Hamburger Kolleg 'Recht als Kultur'), 2016, online accessible at: < http://www.recht-als-kultur.de/de/download/66/364/1819/Werner%20Gephart%20WP%20Constitutions%20as%20Culture.pdf>, last access: 1 August 2019, pp. 1-5.
[34] 'Doing Recht', Habermas, Diebe, 20.
[35] Habermas, Diebe, 20f.
[36] Habermas, Diebe, 20f.

have to be seen as important factors shaping how the law is applied, even though one does not necessarily have to understand them as 'actors' in their own right.[37]

Finally, studying how 'law is done' then also implies taking into account power, conflict and performativity. The relevance of power and power differences in negotiations of the law is obvious: a defendant has significantly less power in deciding what is legal and illegal than the judges presiding over his or her trial. In other cases, power differences might be less obvious. Moreover, it is crucial to note that conflicts are central to 'doing law':[38] conflicts between courts can normally be solved by resorting to hierarchy. Conflicts between defendants and presiding judges over his or her guilt can be resolved by a ruling of the latter, but that does not end the conflict. Other conflicts, however, cannot be resolved by applying force or by resorting to institutional hierarchies.

On a large scale, fundamentally differing views of appropriate sentences between competent courts and the wider public might undermine the legitimacy of the legal system and cause political uproar. A legal system therefore not only has to 'produce sentences that must be – *grosso modo* – predictable', as Siemens argues.[39] It is also bound to produce sentences that are – by and large – accepted by the wider public. Ultimately, the legal system is in need of legitimacy.

'Legitimacy' as a social political phenomenon is the topic of many empirical and theoretical studies. For the purpose of this study, it suffices to say that in the realm of politics, legitimacy is at the very least a two-dimensional term. It can be used (1) to describe the *claim* of a political and legal order to be legitimate, i.e. rightful. It is, however, also used to describe (2) the faith of a population that a given societal

[37] Habermas does that. For the preceding quote, see Habermas 20: 'Das Normengerüst, die Verfahrensstruktur, die Muster der Verhörmethoden, die Arten des Protokollierens, die juristische Ausbildung, die Ausformung des Expertenhabitus, und das Selbstverständnis des Richters spielen ebenso eine wichtige Rolle (…)'.

[38] So far, see Habermas, Diebe, 20-22.

[39] Siemens, Cultural History of Law, 30.

order is rightful.[40] This second dimension of legitimacy has also been defined as 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions'.[41] Conceived in such a descriptive sense, legitimacy is not only a prerequisite of democracies, but for all kinds of political rule. It has to be understood as a 'basic condition of rule because without at least a minimal amount of legitimacy, governing regimes would face deadlock or collapse'.[42] Blatter has hence rightly outlined that every system of government, including dictatorial regimes, seek to 'justify its reign, and this justification can be based on various concepts'. Among those sources of legitimacy are the ideas of *input legitimacy* and *output legitimacy.*[43] They refer to the notion of a political decision being seen as legitimate either because given political outcomes satisfy the public (output legitimacy) or because the way in which competing political interests have been introduced into the government is accepted as rightful, as democracies would claim. (input legitimacy).

In their attempts to understand a population's belief in a system's legitimacy, political scientists have distinguished between *specific* support and *diffuse* support of a political order. Specific support would depend on the system's performance and would be dependent on the satisfaction of political demands. Diffuse support is understood as a fundamental buttress of the political system because the system *in itself* is seen as rightful/legitimate.[44] It is believed that a lack of specific support

---

[40] Nohlen, Dieter: '*Legitimität'*, in: Nohlen, Dieter / Schultze, Rainer-Olaf (eds.): Lexikon der Politikwissenschaft, vol. 1 A-M, München: C.H. Beck [4]2010, pp. 544-546.

[41] Suchman, Mark C.: '*Managing Legitimacy: Strategic and Institutional Approaches',* in: The Academy of Management Review 20 (1995), no. 3, pp. 571-610, [p. 574]; cf. Considine, Mark / Afzal, Kamran Ali: *Legitimacy',* in: Bevir, Mark (ed.): The SAGE Handbook of Governance, London et al.: Sage 2011, pp. 369-385, [p. 371].

[42] Blatter, Joachim K.: *'Legitimacy',* in: Bevir, Mark (ed.): Encyclopedia of Governance, Vol. II, London et al.: Sage Publications 2007, pp. 518-521, [p. 518].

[43] Blatter, Legitimacy, 518.

[44] Easton, David: A systems Analysis of Political Life, New York [3]1979; Nohlen, Legitimität; Gabriel, Oscar: *'Politische Unterstützung'*, in: Greiffenhagen, Martin/Greiffenhagen, Sylvia (eds.):

does not immediately impair the ‘stability and performance’ of a political system, if diffuse support is high. However, it has been suggested that, in the long run, ‘notorious deficits in government performance’ may cause severe ‘crises of trust and legitimacy’. [45] Conversely, it seems fair to assume that, in political transformations, a certain record of 'performative', i.e. output successes of a political system are a prerequisite for diffuse support, i.e. a belief that the given body politic is *rightful* and *legitimate,* to be developed.

In a wider sense, the legal order is a branch of a country’s political system. It therefore also depends on legitimacy. Where the support of courts or specific trials is contested and weak, it is particularly important for courts to claim legitimacy. This is particularly the case in post-conflict situations. The 1990s, when most GDR officials were sentenced in *national* courts, also saw a high tide of *international* tribunals in the wake of internal conflicts or wars. In The Hague (Netherlands), the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993. In Arusha (Tanzania), The International Criminal Tribunal for Rwanda (ICTR) was founded in 1994. In 1998, 160 states resolved to establish the International Criminal Court (ICC) in The Hague, which was a caesura in the gradual development of an international criminal law. Proceedings for state crime are in need of justification and explanation, particularly if carried out by international *ad-hoc* tribunals.[46] Therefore, it has convincingly been argued that actors in such trials, such as prosecutors ‘(…) do more than engage in investigation and the collection of evidence. They ground their interventions by framing their prosecutions in a language aimed at justifying the decision to pursue individual

Handwörterbuch zur politischen Kultur der Bundesrepublik Deutschland, Wiesbaden: Westdeutscher Verlag ^{2}2002, pp. 477-483.

[45] Gabriel, Politische Unterstützung, 480.

[46] Levi, Ron / Dezalay, Sara / Michael Amiraslani: *Prosecutional Strategies and Opening Statements: Justifying International Prosecutions from the International Military Tribunal at Nuremberg through to the International Criminal Court,* in: comparativ. Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 26 (2016), no. 4, pp. 58-73.

criminal accountability'.[47] This aims at ensuring that '(…) other institutional players and external audiences [see] these prosecutions' as legitimate.[48] Where the acceptance of courts and trials is low and contested, as in the case of international tribunals – or arguably the GDR – such claims for legitimacy become a central element not only of the work of state prosecutors, but also of the judges who hand down a verdict.[49] Trials against former GDR officials, by contrast, could not resort to such extraordinary means. They were restricted by the procedural rules of Germany's *Rechtsstaat.* In other words: legally speaking, the revolutionary moment had passed once the Eastern *Länder* had acceded to the Federal Republic.

When Germany re-united, two different realities of political legitimacy clashed. In the West, the political, legal, economic, and social system could rely on significant diffuse support. When the five *Länder* of the GDR acceded to the Federal Republic and its political and legal system, East Germans did not necessarily share their western compatriots' diffuse support of the body politic.[50] Grave economic and social realities in the decade following the fall of the GDR most certainly did not help deliver this degree of fundamental legitimacy. However, as I have argued above, delivering legitimacy for a new political order is one of the key objectives of transitional justice measures.

This study will argue that as a branch of the political order, the legal system faced a three-fold challenge after German re-unification. Firstly, it had to conduct highly contested trials against former GDR officials. These proceedings themselves did not enjoy undivided popular support. Rather, the classification of fatal shots as

[47] ibid., 59f.
[48] ibid.
[49] Levi/Dezalay/Amiraslani, Prosecutional Strategies, 59f.
[50] Gabriel, Oscar W.: *'Demokratische Einstellungen in einem Land ohne demokratische Traditionen? Die Unterstützung der Demokratie in den neuen Bundesländern im Ost-West-Vergleich',* in: Falter, Jürgen/Gabriel, Oscar W./Rattinger, Hans (eds.): Wirklich ein Volk? Die politischen Orientierungen von Ost- und Westdeutschen im Vergleich, Opladen: Leske + Budrich 2000, pp. 41-78.

'crimes' was contested. The chronological sequence of trials, which saw some rank-and-file border guards convicted before most senior leaders could be seen in the dock, contributed to claims of 'hanging the small men and letting the big men run'. These trials were, secondly, difficult, as the 'imported' legal system did not benefit from much diffuse support, as it had not had much time to gain it. Rather, it was perceived as a foreign legal system. Thirdly, even though the legitimacy of the specific trials as well as the legal system as such was contested, the courts faced the challenge of producing legitimacy for the wider new political system through the way they carried out the proceedings and through the verdicts. This was demonstrated in public debate by politicians and journalists, who emphasised the importance of the trials for 'coming to terms' with German Socialism.

This dissertation contributes to the emerging research field of a cultural history of law by investigating how the use of the criminal law as a transitional justice measure was intertwined with political needs and desires. It will examine how politicians, courts, defendants and the public have negotiated the legitimacy, legality and usefulness of criminal trials as a measure of *Vergangenheitsaufarbeitung,* or – to use an internationally-used term – transitional justice.

Transitional Justice

The research field of post-conflict transitional justice has grown significantly over the three decades. The phenomena that are addressed in the literature, however, are not new at all. Questions of how to manage a successful and lasting transition from a violent or authoritarian political system to a more inclusive system of governance and/or peace can already be witnessed in ancient Athens in the 400s B.C. As the classicist Christian Meier has argued, for most of the time since antiquity, human societies resorted to a mix of amnesty, oblivion, and repression of memory as a strategy to deal with violent pasts and memories of suffering in wartime. With the exception of restorative measures and purges after the end of the Napoleonic era, the Treaty of Versailles which ended World War I arguably marked

the paradigm shift away from oblivion and amnesty to the imposition of sweeping retributions on Germany by the allied powers and the forced acknowledgement of Germany's sole responsibility for the War. It was, however, the seminal impact of World War II which entailed that collective and individual responsibility for large-scale crimes against humanity became subject to legal, educative, and political measures that have become the global norm of transitional justice.[51] The law plays a dominant role in these processes. The post-Nuremberg period has therefore also been described as the era of 'judicalisation' of the past.[52]

However, it must be noted that this paradigm shift was not a sole consequence of the mass violence experienced in the twentieth century. Rather, it has been foreshadowed, both intellectually and legally, since the nineteenth century. Rich international debates demonstrate that the idea of holding governments to account for atrocities is a product of emerging humanitarianism in the late nineteenth century.[53]

Transitional justice is a multifaceted term that has been defined in various ways. In the past few years, the emphasis of the scholarship has shifted away from a narrower understanding that sees legal measures at the core of transitional justice[54]

---

[51] Elster, Jon: Closing the books. Transitional Justice in historical perspective, Cambridge: Cambridge University Press 2004. Meier, Christian: Vom Gebot zu Vergessen und der Unabweisbarkeit des Erinnerns. Vom öffentlichen Umgang mit schlimmer Vergangenheit, Siedler: München 2010.

[52] Russo, Henry: '*History of Memory, Policies of the Past: What For?',* in: Jarausch, Konrad/Lindenberger, Thomas (eds.): Conflicted Memories. Europeanizing Contemporary Histories, Oxford/New York: Berghahn 2007, 23-37.

[53] von Lingen, Kerstin: 'Crimes against Humanity'. Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864-1945, Paderborn: Ferdinand Schönling 2018; Segesser, Daniel Marc: Recht statt Rache oder Rache durch Recht? : die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872 – 1945, Paderborn et al.: Schöningh 2010; Bauerkämper, Arnd: Die lange Debatte über 'Crimes against Humanity'. Völkerrecht, die Rolle von Experten und zivilgesellschaftliche Mobilisierung, in: Neue Politische Literatur 63 (2018), No. 3, pp. 377-384;

[54] Teitel defines transitional justice as ‚the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes.' Teitel, Ruth G.: Theoretical and international

to a wider conception of transitional justice as 'an approach seeking to achieve justice by a set of judicial and non-judicial measures implemented in order to redress the legacies of massive human rights abuses', as the *Center for Transitional Justice* has put it.[55] But what is the purpose of transitional justice? According to Mihr, Pickel and Pickel, it has a 'two-dimensional reference frame', i.e. it has two different objectives.[56] (1) It is backward facing in that it aims at 'working through' past wrongfulness. It has been argued that prosecuting and convicting regime perpetrators helps to de-legitimise a regime overcome. Arguably, all of this serves (2) to support the forward-looking objective of transitional justice, namely to legitimise a new (democratic) regime. Transitional justice measures such as lustrations, trials, public acknowledgements and ceremonies etc. serve to foster transparency and accountability in the name of stabilising the new political order.[57] Arguably, even the development of international human rights law can be seen as a permanent tool of transitional justice – or at least of a 'juridification' of the international plane.[58]

framework: transitional justice in new era, in: Fordham International Law Journal 26 (2003) 4, 893-906, 893, which is based on her book Teitel, Ruth G.: Transitional Justice, Oxford et al: Oxford University Press 2000.

[55] quoted in: Mihr, Anja: Transitional Justice and the Quality of Democracy, in: International Journal of Conflict and Violence 7 (2013) 2, 299-313, *299*.

[56] 'Zweidimensionierter Bezugsrahmen', in: Mihr/Pickel/Pickel, Transitional Justice, 7f.

[57] Mihr/Pickel/Pickel, Transitional Justice, 7f.; Roht-Arriaza, Naomi: *'The new landscape of transitional justice'*, in: Roht-Arriaza, Naomi / Mariezcurrena, Javier (eds.): Transitional Justice in the Twenty-First Century, Cambridge et al.: Cambridge University Press 2006, pp. 1-17, [p. *2*]; Increasingly, scholars contemplate to what extent transitional justice can also be used to address past 'injustices' in stabile democracies. Cf. the debate about re-habilitating men who were sentenced for homosexual acts in West Germany between 1946 and the eventual deletion of § 175 StGB in 1994. See Henry, Nicola: *'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies',* in: International Journal of Transitional Justice 9 (2015), pp. 199-218.

[58] Brems, Eva: 'Transitional Justice in the Case Law of the European Court of Human Rights', in: The International Journal of Transitional Justice 5 (2011), pp. 282-303.

The term 'transitional justice' is used both in normative and in descriptive ways. The assumption that transitional justice measures create stable democracies and foster the rule of law is a normative claim.[59] Likewise, the research field of transitional justice is cultivated both by academics, but also by practitioners, and therefore bears strong normative connotations.[60] Sober examinations of societal impacts of transitional justice measures are challenging. They rely on comparative cross-national studies of aggregated data. In some cases, however, a correlation between sweeping transitional justice measures and a democratisation could be shown.[61] However, doubts have been uttered as to whether state-mandated '*Diktaturbewältigung'* (overcoming of dictatorships) can be of service for the establishment of democratic structures, especially in the light of 'participative dictatorships'. Moreover, it has been questioned what exactly 'justice' or 'historical justice' can mean in the light of up to millions of murdered victims in genocides.[62] Moreover, it is important to note that political scientists use the term 'transition' not only to describe regime changes from dictatorships to democracies, but also *vice versa.*[63] Transitions *as such* are therefore not limited to a project of liberalisation and democratisation. The term *transitional justice,* however, implies a normative dimension through the ambiguous word *justice.* However*,* it is also used as a merely descriptive and analytical term.

[59] Mihr/Pickel/Pickel, Transitional Justice, 5. For a theoretical critique of the research field, see Bell, Christine: *'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field",* in: The International Journal of Transitional Justice 3 (2009), pp. 5-27.

[60] Lambourne, Wendy: *'Transitional Justice and Peacebuilding after Mass Violence',* in: The International Journal of Transitional Justice 3 (2009), pp. 28-48.

[61] Horne, Cynthia M.: *'The Impact of Lustration on Democratization in Postcommunist Countries',* in: The International Journal of Transitional Justice 8 (2014), pp. 496-521; Mihr/Pickel/Pickel, Transitional Justice, 5.

[62] Weinke, Transitional Justice, 251.

[63] Kaase, Max: *'Transition/Transformation',* in: Greiffenhagen, Martin/Greiffenhagen, Sylvia (eds.): Handwörterbuch zur politischen Kultur der Bundesrepublik Deutschland, Wiesbaden: Westdeutscher Verlag ^{2}2002, pp. 600-610.

As ‘transitional justice’ is ambiguous, both as a term and as a concept,[64] it is important to note that in this study, it will only be used as a descriptive term and as an analytical tool. This study neither subscribes to normative claims underpinning much of the research in the field, nor does it wish to further any such normative assumptions inadvertently. Therefore, in this study, ’transitional justice’ is used as a general term to describe a range of institutional measures – legal, political, symbolic – deployed by a post-revolutionary or post-conflict government in order to stabilise the new political order by de-legitimising the overthrown (form of) government. The success of such transitional justice measures will be measured in accordance with the degree to which they have helped to deliver legitimacy to the new body politic and to pacify the divisive potential of the past. Success is therefore only understood in a utilitarian way.

When used in this capacity, the term may also be used retroactively as an analytical term.[65] In the German case, the terms *Vergangenheitsbewältigung* and *Vergangenheitsaufarbeitung* have played key roles in historical debates. Germany is often held up as an example of successful transitional justice induced externally. However, such celebrations of Germany rarely refer to the conceptual tools of transitional justice, but remain in the language of *Vergangenheitsaufarbeitung* or -*bewältigung*.[66] In fact, during the thirteen years of its existence, *The International Journal of Transitional Justice* has only published one case study of the GDR, while several other countries have been featured multiple times.[67]

---

[64] Ainley, Kirsten: ‘Evaluating the Evaluators: Transitional Justice and the Contest of Values’, in: International Journal of Transitional Justice 11 (2017), pp. 421-442.

[65] Steinberg, Ronen: *‘Transitional Justice in the Age of the French Revolution’,* in: The International Journal of Transitional Justice 7 (2013), pp. 267-285; Weinke, Annette: *‘West Germany. A Case of Transitional Justice avant la lettre?’,* in: Wouters, Nico (ed.): Transitional Justice and Memory in Europe (1945-2013), Cambridge/Antwerp/Portland: Intersentia 2017, pp. 25-61.

[66] Weinke, Transitional Justice, 251; Mihr/Pickel/Pickel, Transitional Justice, 13.

[67] Beattie, Andrew H.: *‘An Evolutionary Process: Contributions of the Bundestag Inquiries into East Germany to an Understanding of the Role of Truth Commissions’,* in: The International Journal of Transitional Justice 3 (2009), pp. 229-249.

The law, most notably the *criminal* law, plays a specific role in processes of transitional justice. As in the case of the Nazi dictatorship or the GDR, the law itself has often been entangled with past state crimes, and therefore needs rehabilitation.[68] At the same time, it is used as a vital tool to 'overcome' those very crimes. Competing aims of transitional justice processes can place the legal system in a dilemma, as Teitel claims: 'In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation.'[69] But to do so, a balance has to be struck between satisfying popular expectations of justice and the principles of the rule of law.[70] This study contributes to the research field of transitional justice by providing an in-depth case study into the these very conflicts over the use of the criminal law as a measure of transitional justice. It also examines procedural deficiencies of those trials, and investigates how the wider public has engaged with them.

Post-Socialist Criminal Trials

Criminal prosecution of former GDR officials for alleged state crime was a major policy of transitional justice, as the brief overview of criminal trials and investigations above has shown. State crimes prosecuted included cases of voter fraud, perversion of justice[71], economic crimes such as corruption and misappropriation of public funds, espionage, physical abuse of prisoners, doping, and, as a key case group, killings at the Inner German border and the Berlin Wall.

[68] Bundschuh, Thomas: *'Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity'*, in: International Journal of Transitional Justice 9 (2015), pp. 10-32.
[69] Teitel: Transitional Justice, 6.
[70] Weinke, Transitional Justice, 250-251.
[71] For a recent legal analysis of the proceedings against judges and state prosecutors for perversion of justice, see Keller, Iris: Die strafrechtliche Aufarbeitung von DDR-Justizunrecht, Frankfurt a.M.: Internationaler Verlag der Wissenschaften 2013.

These have been labelled as 'border guard cases', even though the term is sometimes also synonymously used for all trials against former GDR officials.[72]

Around the turn of the millennium, a major research project led by academic lawyers Klaus Marxen and Gerhard Werle has provided invaluable fundamental work on the practice of criminal prosecution after the end of the GDR.[73] This research project has published edited primary sources, especially criminal judgments, and so provided invaluable groundwork for this dissertation.[74]

Partially as an offspring from Marxen's and Werle's research project, a series of legal academic publications has extensively studied the legal practice of state crime prosecution in various fields, including cases of killings at the Inner-German Border[75]; voter fraud[76]; abuse of justice;[77] corruption, abuse of office and the misappropriation of public funds.[78] Other publications investigate the public debate on criminal trials against former GDR officials[79] and an overview on the 'politics of the past' (Norbert Frei) between the fall of the Berlin Wall in 1989 and German

[72] For a condensed overview, see Marxen/Werle/Schäfter, Strafverfolgung, 28.
[73] Marxen, Klaus / Werle, Gerhard: Die strafrechtliche Aufarbeitung von DDR-Unrecht. Eine Bilanz, Berlin / New York: de Gruyter 1999.
[74] Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, Berlin 2000 – 2009.
[75] Rummler, Toralf: Die Gewalttaten an der Deutsch-Deutschen Grenze vor Gericht, Berlin / Baden-Baden: Berlin Verlag / Nomos 2000, whose figures have been authoritative for all subsequent scholarship, even though his book was published before the end of the last border guard trial in 2004. For updated figures, see Marxen/Werle/Schäfter, Strafverfolgung.
[76] Bock, Petra: Vergangenheitspolitik im Systemwechsel. Die Politik der Aufklärung, Strafverfolgung, Disqualifizierung und Wiedergutmachung im letzten Jahr der DDR, Berlin: Logos 2000.
[77] For a recent legal analysis of the proceedings against judges and state prosecutors for perversion of justice, see Keller, Iris: Die strafrechtliche Aufarbeitung von DDR-Justizunrecht, Frankfurt a.M.: Internationaler Verlag der Wissenschaften 2013.
[78] Fahnenschmidt, Willi: DDR-Funktionäre vor Gericht. Die Strafverfahren wegen Amtsmißbrauch und Korruption im letzten Jahr der DDR und nach der Vereinigung (= Berliner Juristische Universitätsschriften, Bd. 5), Berlin: Verlag A. Spitz / Baden-Baden: Nomos 2000.
[79] Wingenfeld, Heiko: Die öffentliche Debatte über die Strafverfahren wegen DDR-Unrechts. Vergangenheitsaufarbeitung in der bundesrepublikanischen Öffentlichkeit der 90er Jahre, Berlin: Berliner Wissenschaftsverlag 2006

reunification in 1990.[80] This body of literature relieves this study from the obligation of providing detailed and in-depth descriptions of the jurisprudence as such, as we will be able to draw on the literature for quantitative overviews of case groups.[81]

Naturally, academic lawyers ask different research questions from historians. Their debates have gravitated around questions of the legality, constitutionality, and moral legitimacy of criminal trials against border guards and other former GDR officials. The prohibition of retroactive punishment, an ancient legal principle going back to the Roman formula of *'nullum crimen, nulla poena sine lege'*, was a particularly important point in these considerations.[82] This body of literature is a rich potential seed for future research into how contested the 'border guard cases' were in the legal sphere.

Owing to temporal proximity, historical scholarship is only just beginning to investigate these proceedings, their pre-history, and their societal ramifications. Around the millennium, transitional justice in East Germany attracted the attention of political scientists. These texts provide meaningful overviews of the measures taken, and also offer instructive chronologies of the development of jurisprudence

[80] Bock, Petra: Vergangenheitspolitik im Systemwechsel. Die Politik der Aufklärung, Strafverfolgung, Disqualifizierung und Wiedergutmachung im letzten Jahr der DDR, Berlin: Logos 2000.

[81] Marxen/Werle/Schäfter, Strafverfolgung provides an updated quantitative overview of criminal investigations and legal proceedings from 1989 until 2005.

[82] For example: Buchner, Silke: Die Rechtswidrigkeit der Taten von ‚Mauerschützen' im Lichte von Art. 103 II GG unter besonderer Berücksichtigung des Völkerrechts. Ein Beitrag zum Problem der Verfolgung von staatlich legitimiertem Unrecht nach Beseitigung des Unrechtssystems, Frankfurt a.M.: Peter Lang 1996; Geiger, Rudolf: *'The German Border Guard Cases and International Human Rights'*, in: European Journal of International Law, 9 (1998), pp. 540-49; Gabriel, Manfred J.: *'Coming to Terms with the East German Border Guards Cases'*, in: Columbia Journal of Transnational Law, 38 (1999), pp. 375-418; Quint, Peter E.: *'Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command'*, in: The Review of Politics, 61 (1999), no. 2, pp. 303-29.

on the border guard cases.[83] Jan-Werner Müller is highly critical of almost every tool of transitional justice chosen, especially of the border guard cases, for their failure to take into account the needs of the East Germans, despite neglecting a detailed examination of the historical background and the cultural ramifications of these processes.[84] This desideratum has partly been met by one rather short sociology-of-law-study, albeit at the price of equating public opinion with press coverage.[85]

More recently, historians have started to approach the proceedings. A series of shorter articles on the development of the jurisprudence has made the comprehensive findings of academic lawyers more accessible for a wider audience.[86] Likewise, Pertti Ahonen studies the killings at the Berlin Wall and devotes his final chapter to the commemoration and afterlife of the deadly border, including a cursory discussion of the border guard cases. By looking at a few test cases and the *Politbüro-Prozess,* he particularly pays attention to the defence strategies of defendants and their lawyers. Another focus of this chapter is the public commemoration through memorial sites like the East Side Gallery or the *Gedenkstätte Berliner Mauer.*[87] Recently, these publications have been

[83] Müller, Jan-Werner: *'East Germany. Incorporation, Tainted Truth, and the Double Division'*, in: Barahona de Brito, Alexandra / Gonzalez Enriquez, Carmen / Aguilar, Paloma (eds.): The politics of memory and democratization, Oxford et al.: Oxford University Press 2003, pp. 248-74;. McAdams, A. James: Judging the Past in Unified Germany, Cambridge et al: Cambridge University Press 2001.

[84] Müller, East Germany.

[85] Wingenfeld, Heiko: Die öffentliche Debatte über die Strafverfahren wegen DDR-Unrechts. Vergangenheitsaufarbeitung in der bundesrepublikanischen Öffentlichkeit der 90er Jahre, Berlin: Berliner Wissenschaftsverlag 2006.

[86] Sälter, Gerhard: *'Der Rechtsstaat und das Grenzregime der DDR. Die strafrechtliche Verfolgung der Grenzdelikte in der Bundesrepublik',* in: Ganzenmüller, Jörg (ed.): Recht und Gerechtigkeit. Die strafrechtliche Aufarbeitung von Diktaturen in Europa, Köln/Weimar/Wien: Böhlau 2017, pp. 115-130; Vollnhals, Clemens: Die strafrechtliche Ahndung der Gewalttaten an der innerdeutschen Grenze, in: Henke, Klaus-Dietmar (ed.): Die Mauer. Errichtung, Überwindung, Erinnerung, München: dtv 2011, pp. 241-251.

[87] Ahonen: Death. Note that the following section is quintessentially a reproduction of the relevant chapter from Ahonen's monograph: Ahonen, Pertti: Unity on Trial: The Mauerschützenprozesse

complemented by a handbook on the victims of the wall[88] and a handbook on the 'forgotten' victims of the Wall – those who had died at the Inner German border before the Berlin Wall was built: at least thirty-seven people died at the hands of East Berlin's border regime between 1948 and 1961. Of those, thirty-six died through excessive use of firearms, while one victim drowned trying to cross the sector border.[89]

The only major historical study on criminal prosecution as a measure of re-united Germany's *Vergangenheitspolitik* has been written by French historian Guillaume Mouralis.[90] His study covers criminal trials in East Germany between 1989 and 1990, as well as in West Germany. Mouralis focusses almost exclusively on the (undoubtedly important) first two test cases which also feature prominently in my study. Apart from looking at the trial against Honecker, however, Mouralis passes over the other high-profile cases (most notably: the *Politbüro* case) and the high court decisions of the Federal Constitutional Court and the European Court of Justice. He does, however, provide an extensive section of almost seventy pages on criminal investigations and trials against GDR officials between the fall of the Wall and German reunification.[91] Mouralis also examines the roots of this form of transitional justice in West Germany's trials against Nazi perpetrators and in the work of the Federal Republic's *Zentrale Erfassungsstelle der Landesjustizverwaltungen (ZESt),* a state prosecutor's office designed to keep track of grave human right abuses in East Germany. He rightly identifies the work of this

---

and the East-West Rifts of Unified Germany, in: Fuchs, Anne / James-Chakraborty, Kathleen / Shortt, Linda (eds.): Debating German Cultural Identity since 1989, Rochester: Camden House 2011, pp. 30-45.

[88] Hertle, Hans-Hermann / Nooke, Maria (eds.): The Victims at the Berlin Wall, 1961-1989. A Biographical Handbook, Berlin: Ch. Links Verlag 2011.

[89] Sälter, Gerhard / Dietrich, Johanna / Kuhn, Fabian: Die vergessenen Toten. Todesopfer des DDR-Grenzregimes in Berlin von der Teilung bis zum Mauerbau (1948-1961), Berlin: Ch. Links 2016.

[90] Mouralis, Guillaume: Une épuration allemande. La RDA en procès, 1949-2004, Paris: Fayard 2008.

[91] ibid., 73-140.

authority as a *'un legs contraignant'* – 'a binding legacy' – whose work must not be overlooked when examining the roots of criminal trials as a measure of post-socialist transitional justice.[92] Unfortunately, the breadth of Mouralis' study is sometimes marred by a lack of detail; moreover his work has been all but neglected in German debates. Finally, a few non-academic books deserve a mention, most notably Roman Grafe's 'Deutsche Gerechtigkeit', in which he offers summaries of twenty trials against border guards, the *Politbüro der SED* and the National Defence Council. Moreover, the volume documents seven interviews with survivors, state prosecutors and judges.[93]

Post-Socialist Transitional Justice in Re-united Germany

Even though the term 'transitional justice' had not been coined in the early 1990s, a comprehensive set of transitional justice tools was deployed after German reunification. These measures included compensatory, symbolic, and legal measures, truth inquiries and purges, even though all these forms of public *Aufarbeitung* were, of course, intertwined. A notorious example of reparative measures was the restitution of expropriated properties to their former owners – the principle of *restitution before compensation* is thought to have caused sustained legal uncertainty and widespread frustration and anger among East Germans who lost their homes.[94] On the symbolic level, many memorials have been established to commemorate the victims at the Inner German border, German division itself,

[92] Mouralis, épuration, 264-268 and, more generally, 241-268; Only few studies have looked at the *ZESt,* e.g. Grasemann, Hans-Jürgen: Reanimation eines Fossils. Der Beitrag der Zentralen Erfassungsstelle Salzgitter zur justitiellen Aufarbeitung des SED-Unrechts, in: Stephan, Annegret (ed.): 1945 bis 2000. Ansichten zur deutschen Geschichte – Zehn Jahre Gedenkstätte Moritzplatz Magdeburg für die Opfer politischer Gewaltherrschaft 1945 bis 1989, Opladen: Leske & Budrich 2002, 55-68. However, histories of institutions are not *en vogue* in current historiography. Weinke's book on the *Central Office* (for investigating Nazi crimes) is a rare exception, see Weinke, Annette: Eine Gesellschaft ermittelt gegen sich selbst. Die Geschichte der Zentralen Stelle in Ludwigsburg 1958 – 2008, Darmstadt: Wissenschaftliche Buchgesellschaft 2008.

[93] Grafe, Roman: Deutsche Gerechtigkeit. Prozesse gegen DDR-Grenzschützer und ihre Befehlsgeber, München: Siedler 2004; Gerig, Uwe: Morde an Der Mauer, Böblingen: Tykve 1989.

[94] McAdams, Judging the Past, 124-156.

the daily oppression through the Stasi, or the fates of many thousand political detainees at notorious prisons.[95] Two parliamentary inquiry committees – the so-called *'Enquete-Kommissionen* – attempted to 'work through' the past of the GDR.[96] Moreover, it was decided to open the Stasi files to the public and to establish an authority that would administer access to Stasi files for the affected individuals and researchers – this *Gauck Authority,* as the institution has been called, was initially a unique feature of the East German transition, and has since become an example to other East European states.[97] Purges of former party and Stasi members, that is, lustrations of the public service, were sweeping and often unsettling, even though they granted individuals more rights to challenge the outcomes than most other post-socialist countries did.[98] In all these measures of state-mandated transitional justice, the ideological role allocation was as clear as day. It was the *Eastern* part of the country that underwent transition in various forms in order to be made fit for reunification with the *West.*

---

[95] As a general introduction to the field, see Beattie, Andrew H.: 'The Politics of Remembering the GDR. Official and State-Mandated Memory since 1990', in: Clarke, David / Wölfe, Ute (eds.): Remembering the German Democratic Republic. Divided Memory in a United Germany, Houndsmills: Palgrave Macmillan 2011, pp. 23-35. For a detailed account of memorials of German division and the GDR regime, see Rudnick, Carola S.: Die andere Hälfte der Erinnerung. Die DDR in der deutschen Geschichtspolitik nach 1989, Bielefeld: Transcript 2011. On memorials, see also the various essays in Hodgin, Nick / Pearce, Caroline (eds.): The GDR remembered. Representations of the East German State since 1989, Rochester: Camden House 2011, 95-200.

[96] Beattie, Andrew H.: Playing politics with history. The bundestag inquiries into East Germany, New York et al.: Berghahn Books 2008.

[97] Müller, Jan-Werner: *'East Germany. Incorporation, Tainted Truth, and the Double Division'*, in: Barahona de Brito, Alexandra / Gonzalez Enriquez, Carmen / Aguilar, Paloma (eds.): The politics of memory and democratization, Oxford et al.: Oxford University Press 2003, pp. 248-74, *265-68*. More specifically on memory, testimony and memorials regarding the Stasi, see Jones, Sara: The Media of Testimony. Remembering the East German Stasi in the Berlin Republic, Houndmills: Palgrave Macmillan 2014.

[98] Müller, East Germany, 262-65. Staats, Johann-Friederich: '"Lustration" – oder die Überprüfung der Richter und Staatsanwälte aus der DDR', in: Bästlein, Klaus (ed.): Die Einheit. Juristische Hintergründe und Probleme. Deutschland im Jahr 1990, Schriftenreihe des Berliner Landesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR, Berlin 2011, pp. 85-103.

A crucial aspect of East Germany's transformation may not normally be considered to be a transitional justice tool in the strict sense. But the history of German re-unification cannot be told without mentioning the *Treuhand.* This public trust was charged with keeping the so-called *volkseigenes Vermögen* (public assets), most notably factories, companies, and stores. It was founded on 1 March 1990 and closed on 31 December 1994. Until today, the *Treuhand* remains a polarising topic among many East Germans, while it is widely unknown to most West Germans.[99] Most recent public debates in Germany about the *Treuhand* demonstrate that in East Germany, it is one of the most prominent aspects of German reunification. On the eve of potentially disrupting state elections in Thüringen, Sachsen, and Brandenburg in autumn 2019, some politicians have even demanded that the work of the *Treuhand* itself demands *Aufarbeitung.* [100] In his remarkable and comprehensive study on the *Treuhand,* Böick has convincingly described the trust as a 'entrepreneurial revolutionary regime' that 'shaped a far-reaching market and social revolution'. [101] If we follow Böick's argument that the *Treuhand* is a 'bad bank' in terms of 'memory culture',[102] it will be important to take into account how debates about and experiences of the prosecution of former GDR officials might

[99] Böick, Marcus/Goschler, Constantin: Wahrnehmung und Bewertung der Arbeit der Treuhandanstalt (= Studie im Auftrag des Bundesministeriums für Wirtschaft und Energie), 2017, <https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/wahrnehmung-bewertung-der-arbeit-der-treuhandanstalt-lang.pdf?__blob=publicationFile&v=24>, last access: 14 August 2019.
[100] 'Linke will Waigel, Köhler und Sarrazin über Treuhand befragen', in: Frankfurter Allgemeine Zeitung (online), 4 May 2019, <https://www.faz.net/aktuell/untersuchungsausschuss-linke-will-treuhand-aufarbeiten-16170242.html>, last access: 15 August 2019; In summer 2019, Birgit Breuel, president of the *Treuhand,* gave one of only few interviews on the work of the trust. See 'Westdeutsche hätten das nicht durchgehalten', in: Frankfurter Allgemeine Sonntagszeitung (online), 21 July 2019, <https://www.faz.net/aktuell/wirtschaft/treuhand-chefin-birgit-breuel-im-interview-16294586.html>, last access: 15 August 2019.
[101] 'unternehmerisches Revolutionsregime (…), welches im Osten Deutschlands (…) eine einschneidende Markt- und Gesellschaftsrevolution ausgestaltete.', Böick, Marcus: Die Treuhand. Idee – Praxis – Erfahrung, 1990-1994, Göttingen: Wallstein 2018, p. 733.
[102] 'eine erinnerungskulturelle *Bad Bank',* ibid., 724.

have been affected by or intertwined with those experiences of privatisation, shutdown, and unemployment for which the *Treuhand* has become emblematic.[103]

'Coming to Terms' with the Nazi Past

As we will see, the process of transitional justice after the fall of the GDR cannot be understood without recourse to the process of transitional justice in West Germany after World War II. This endeavour, with its weak spots as well as its accomplishments, served as a comparison and, more importantly, as a source of legitimacy.

In the case of post-war West Germany, immediate post-war policies of the allies, such as prosecuting regime elites, re-educating the citizenry, de-nazification and de-militarisation, were only the beginning of decades of societal attempts to 'master' the Nazi past. The case of West Germany after 1945 has been described as a potential case of transitional justice *avant la lettre*.[104]

Ever since the end of the war, the Allied Powers and West German authorities had to balance conflicting demands: enabling prosecution of suspected war criminals, distancing the new Germany from the Nazi period in a plausible way, and integrating millions of former Nazi partisans into the new society. Paving the way for scholarship in the 1990s, Norbert Frei argued that a relatively vast amnesty of former NSDAP party members and other collaborators of the Nazi regime and their subsequent integration into society and public service stabilised the young

[103] For criminal trials in cases of economic crimes during East Germany's economic transformation, see Boers, Klaus / Nelles, Ursula / Theile, Hans (eds.): Wirtschaftskriminalität und die Privatisierung der DDR-Betriebe, Baden-Baden: Nomos 2010.

[104] Weinke, Annette: *Die Bundesrepublik Deutschland – ein Fall von Transitional Justice avant la lottre?,* in: Mihr, Anja / Pickel, Gert / Pickel, Susanne (eds.), 'Handbuch Transitional Justice. Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie, Wiesbaden, Springer 2019, pp. 249-274.

Federal Republic significantly in 1949 and the early 1950s.[105] In his study, he set out to examine political and judicial ways of 'amnesty, integration and demarcation'[106] for which he coined the term *Vergangenheitspolitik* (politics of the past). These were legislative measures which enabled the rehabilitation and amnesty of millions of Germans; political debates about war criminals, and judicial attempts to demarcate the new body politic from remainders of Nazi ideology.

These measures were, of course, preceded by the allied policy of de-nazification, as well as by the international Nuremberg trials where alleged German war criminals were prosecuted.[107] After those leaders of the Nazi state, the NSDAP and the Wehrmacht who had survived the war had been convicted – and often executed – in Nuremberg, the West German authorities were rather reluctant to go after those who had participated in the mass murder of the European Jews and other victims. It was not until the late 1950s that a wave of trials against former SS men started: the *Ulmer Einsatzgruppenprozess* (1958), the Frankfurt Auschwitz trials (1963-65) and the Majdanek trials (1975-81). Despite the huge public attention to these trials – and the Eichmann trial in Jerusalem – the judgements were very modest and, in the eyes of many contemporary witnesses as well as in hindsight, disappointing. Until a few years ago, the German judiciary insisted on proof of individual involvement in acts of killing as a basis for the conviction of assistance to manslaughter. This jurisprudence has since been overruled. Recently, former KZ

[105] Frei, Norbert: Adenauer's Germany and the Nazi Past. The Politics of Amnesty and Integration, New York: Columbia University Press 2002, (first in 1996), 15-16. On the integration of millions of former POWs, see most recently the instructive study by Wienand, Christiane: Returning Memories. Former Prisoners of War in Divided and Reunited Germany, Rochester: Camden House 2015.

[106] 'Amnestie, Integration und Abgrenzung' Frei: Vergangenheitspolitik', 14.

[107] See most recently Primel, Kim Christian: The betrayal. The Nuremberg trials and German divergence, Oxford et al: Oxford University Press 2016. See also Weinke, Annette: Die Nürnberger Prozesse, München: Beck 2006 and Primal, Kim C. / Stiller, Alexa (eds.): Reassessing the Nuremberg Military Tribunals. Transitional Justice, Trial Narratives, and Historiography, New York / Oxford: Berghan Books 2012.

guards have been convicted solely for being part of the system which ran the extermination camps.[108]

Scholars have shed doubt on the notion that post-war West Germany really was such a convincing forerunner of international humanitarianism. After 1949, when the Federal Republic (and the GDR) was established, trials against former Nazi perpetrators were based solely on German domestic criminal law, not on the international foundations of the Nuremberg trials. This has been interpreted as a rejection of the universal concepts of the Western allies, and as an attempt to rehabilitate the idea of the German *Rechtsstaat.*[109]

These 'politics of the past' were accompanied by other transitional justice measures taken by West German authorities after 1945. On the international plane, the Adenauer government was keen on seeking reconciliation with the Western powers, especially France, and on establishing a relationship with Israel which included compensation agreements, the so-called *Wiedergutmachung.*[110] On the domestic plane, the Federal and Bavarian governments agreed to establish and co-fund the *Institut für Zeitgeschichte,* originally called the *Deutsches Institut für Geschichte des Nationalsozialismus,* a key institution in academic attempts to 'come to terms with the past'. Another step was the establishment of the Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes (abbreviated as Central Office / *Zentrale Stelle*) in 1958 in

[108] Wittmann, Rebecca: Beyond Justice. The Auschwitz Trial, Cambridge: Harvard University Press 2005; Pendas, Devin O.: The Frankfurt Auschwitz Trial, 1963-65. Genocide, history, and the limits of the law, Cambridge: Cambridge University Press 2006.
[109] Weinke, Transitional Justice, 251; Priemel, Kim Christian: The Betrayal. The Nuremberg trials and German divergence, Oxford et al: Oxford University Press 2016; Pendas, Trial.
[110] Goschler, Constantin: Wiedergutmachung. Westdeutschland und die Verfolgten des Nationalsozialismus, 1945-1954, München: Oldenbourg Verlag 1992.

Ludwigsburg – this office was designed to concentrate criminal investigations against those who had participated in Nazi crimes.[111]

A mirror institution was established in 1961 after the Berlin Wall had been constructed and the Inner German border had become hermetically sealed. The 'Central Registration Office of State Judicial Administrations' (Central Registration Office, Zentrale Erfassungsstelle der Landesjustizverwaltungen; *ZESt*) in Salzgitter had the task of documenting all potential crimes committed by GDR officials for future criminal prosecution (see chapter 1). The establishment of the *ZESt* alongside the Central Office was, self-evidently, motivated by the contemporary concept of totalitarianism and an implicit (moral) equation of Nazism and Fascism with Socialism. The establishment of the *ZESt,* therefore, has to be understood as a reaffirmation of claims to the political legitimacy of the Federal Republic in contrast to the – in the Western view – totalitarian and illegitimate GDR. The latter not only accounted for crimes allegedly comparable to Nazi atrocities, but would also be bound to perish at some point in the future when criminal prosecution became both necessary and possible. Putting Nazi Germany aside, and equating the other part of Germany with Fascism, either actually or morally, became central features of both German states' claims for legitimacy and their quests for identity.[112] The *ZESt* became an important constitutional and

[111] Weinke, Annette: Die Verfolgung von NS-Tätern im geteilten Deutschland. Paderborn: Schönigh 2002; Weinke, Annette: Eine Gesellschaft ermittelt gegen sich selbst. Die Geschichte der Zentralen Stelle in Ludwigsburg 1958 – 2008, Darmstadt: Wissenschaftliche Buchgesellschaft 2008; Umansky, Andrej: 'Geschichtsschreiber wider Willen? Einblick in die Quellen der "Außerordentlichen Staatlichen Kommission" und der "Zentralen Stelle"', in: Nußberger, Angelika / Gall, Caroline von (eds.): Bewusstes Erinnern und bewusstes Vergessen. Der juristische Umgang mit der Vergangenheit in den Ländern Mittel- und Osteuropas, Tübingen 2011, 347-374.

[112] Fulbrook, Mary: German National Identity after the Holocaust, Cambridge: Polity Press 1999; For the GDR, see Leo, Annette: Antifaschismus, in: Martin Sabrow (ed.): Erinnerungsorte der DDR, München: Beck 2009, 30-42; Palmowski, Jan: Inventing a Socialist Nation. Heimat and the Politics of Everyday Life in the GDR, 1945-1990, Cambridge: Cambridge University Press, 2009; Orlow, Dietrich: The GDR's Failed Search for a National Identity, 1945-1989, in: German Studies Review, 29 (2006) 3, 547–558; Eley, Geoff / Palmowski, Jan (eds.): Citizenship and National Identity in Twentieth-Century Germany, Stanford: Stanford University Press 2008; Bialas,

procedural precursor to the path of post-socialist transitional justice eventually taken after the end of the GDR. It also demonstrates how closely post-1945 transitional justice measures were linked with political and normative demarcations towards the GDR.

The process of coming to terms with the Nazi past, of course, went beyond political and legal steps, and continues to do so to date. Debate and examination of the past, that is, of complicity, of seeking justice and truth, and of the consequences to be drawn from this have been at the centre of social and cultural negotiations of identity in West Germany ever since 1945, despite the omnipresent absence – or as Hermann Lübbe put it, *'kommunikatives Beschweigen'* ('communicative silence') – of the Holocaust in the public life of the early Federal Republic.[113] The Holocaust was by no means the central topic of debates in the early years. In the perception of many Germans, the almost total annihilation of European Jewry, amounting to about six million victims, was seen as merely one of the many catastrophes of the Second World War II with its fifty-five million deaths. After Germany had been defeated and the instruments of unconditional surrender had been signed on 7 May and 9 May 1945 respectively, a feeling of defeat and victimhood was widespread.

Wolfgang: Antifaschismus als Sinnstiftung. Konturen eines ostdeutschen Konzepts, in: Bergem, Wolfgang (ed.): Die NS-Diktatur im deutschen Erinnerungsdiskurs,Opladen: Leske & Budrich 2003, 151–70.

[113] Herrmann, Anne-Kathrin: Karl Jaspers: ‚Die Schuldfrage', in: Fischer, Torben / Lorenz, Matthias N. (eds.): Lexikon der ‚Vergangenheitsbewältigung' in Deutschland. Debatten- und Diskursgeschichte des Nationalsozialismus in Deutschland nach 1945, Bielefeld: transcript 2007, 45-46; Bier, Jean-Paul / Allinder, Michael: The Holocaust and West Germany. Strategies of Oblivion 1947-1979, in: New German Critique 19 (1980) 1, 9-29; Buruma, Ian: The Wages of Guilt: Memories of War in Germany and Japan, New York: Farrar, Straus and Giroux 1994; Kansteiner, Wulff: In pursuit of German memory. History, television, and politics after Auschwitz, Athens: Ohio University Press 2006; Niven, Bill: Reactive Memory. The Holocaust and the Flight and Expulsion of Germans, in: Marc Silberstein and Florence Vatan (eds.): Memory and Postwar Memorials. Confronting the Violence of the Past, Houndmills / New York: Palgrave Macmillan 2013, 51-70; Scholtyseck, Joachim: Conservative Intellectuals and the Debate over National Socialism and the Holocaust in the 1960s, in: Gassert, Philipp / Steinweis, Alan E. (eds.): Coping with the Nazi Past. West German Debates on Nazism and Generational Conflict, 1955-1975, New York / Oxford: Berghahn Books 2006, 238–57.

The total war that the Third Reich had brought to Europe had returned, and had made almost every German family a victim of the war. Aerial bombardment, occupation, expulsion, and escape had led to destruction and material hardship, and people's minds were occupied by experiences of internment and the humiliation of defeat.[114] In the months and years to come, at least 800,000 women and an unknown number of men were to become victims of rape, sexual assault, and torture by Allied troops in all four zones of Germany – a fact that was suppressed by the German public in the period immediately following, but which later became a prevalent theme in relativistic narratives.[115] In the years to come, it remained difficult for the German public to acknowledge, in Eugen Kogon's words, that 'defeat and freedom form a unity'.[116] It was only after forty years, in 1985, that 8 May was publicly declared a day of liberation rather than a day of defeat.[117] Still in the 1960s, Rolf Hochhuth could spark a fierce and unprecedented public debate with his play *Der Stellverteter* on the complicity of Pope Pius XII. As for the academic discipline of history, it was telling that the huge success of the TV series 'Holocaust' in 1979 was

[114] Reichel, Peter: Vergangenheitsbewältigung in Deutschland, München 2001, 66-69; Frei, Norbert: 1945 und wir. Das Dritte Reich im Bewusstsein der Deutschen, München: Beck 2009, 82-84. Specifically on the experiences and commemoration of the aerial bombardment, see Süß, Dietmar: Tod aus der Luft. Kriegsgesellschaft und Luftkrieg in Deutschland und England, München: Siedler 2011.

[115] For an intriguing investigation of the mass experience of rape, and the way the German public dealt with these crimes, see Gebhardt, Miriam: Als die Soldaten kamen. Die Vergewaltigung deutscher Frauen am Ende des Zweiten Weltkrieges, München: DVA 2015. Her count of at least 800,000 women who were victims of sexual assault claims to be a rather conservative one, and neglects the unknown number of multiple rapes that many women suffered.

[116] '*Niederlage und Freiheit eine Einheit bilden',* Kogon, Eugen, 'Tag der Niederlage, Tag der Befreiung', in: Die Zeit, 19.4.1985. See also Reichel, Peter: Politik mit der Erinnerung. Gedächtnisorte im Streit um die nationalsozialistische Vergangenheit, München/Wien, 1995, 275-95.

[117] Most famously, Richard von Weizsäcker stated in his speech on the fortieth anniversary of the end of the war that the 8.5.1945 was not the day of defeat, but the day of liberation. See Reichel, *Politik mit der Erinnerung,* 290-96; Beljan, Daniela / Lorenz, Matthias N.: Weizsäcker-Rede, in: Fischer, Torben / Lorenz, Matthias N. (eds.),: Lexikon der "Vergangenheitsbewältigung" in Deutschland. Debatten- und Diskursgeschichte des Nationalsozialismus nach 1945 (Bielefeld, 2007), pp. 232-35; Frei, 1945 und wir, 36.

considered a 'black day for historical scholarship'.[118] 'Holocaust' marked the beginning of a new trend in public negotiations of the war, as it triggered a shift in attention away from the perpetrators and onto the victims of the German genocide, even though the seminal shift in opinion that has often been ascribed to the series must be questioned with regard to private and family memory.[119]

After the fall of the Berlin Wall in 1989 and German reunification in 1990, debates about the genocide of European Jews and other victim groups have retained their central character in German collective memory. Even though debates about history and national identity have been persistent since 1945 and 'have at times reached almost obsessive proportions',[120] the search for national identity and the struggle to incorporate the contested German past into constructive narratives remains a contested issue to date. Since the late 1990s, German victimhood during and after the war has especially gained increased intention, both in scholarship and in popular culture.[121]

My study will contribute to this debate by exploring how the West German history of mastering the past informed the transition from socialism to liberal democracy and capitalism in East Germany. By studying the work and the public perception of the *ZESt,* we can gain insight into how this institution's role

[118] ',schwarzer Tag für die Geschichtswissenschaft', Broszat, Martin: 'Holocaust' und die Geschichtswissenschaft, in: VfZ 27 (1979), pp. 285-298.
[119] See Ebert, Philipp: The Impact of the TV-series *Holocaust* on West German Memory Culture, 1978-83, *M.Phil dissertation, University of Cambridge, 2015.*
[120] Fulbrook: Identity.
[121] Gebhardt: Als die Soldaten kamen; Niven, Bill: Facing the Nazi Past: United Germany and the Legacy of the Third Reich, London: Routledge 2001; Wittlinger, Ruth: Taboo or Tradition? The ‚Germans as Victims' Theme in West Germany until the Early 1990s, in: Niven, Bill (ed.): Germans as Victims. Remembering the Past in Contemporary Germany, Houndmills/New York: Palgrave Macmillan 2006, pp. 62-75. Critically, see Berger, Stefan: On Taboos, Traumas and Other Myths: Why the Debate about German Victims of the World War II Is Not a Historian's Controversy, in: Niven, Bill (ed.): Germans as Victims. Remembering the Past in Contemporary Germany, Houndmills / New York: Palgrave Macmillan, 2006, pp. 210-24. Süß: Tod aus der Luft.

foreshadowed the path of transitional justice chosen after 1989/1990.[122] By looking at debates about the *ZESt,* we can learn how political actors and public servants have constructed their views on German reunification against the backdrop of West German ways of mastering the Nazi past. Exploring political debates about prosecution, amnesty, and lapse of time after 1990 can show us how politicians, activists, and the media have related the post-1989 transition to the legacy of the Third Reich in both German states. In short: my study will show how discourses and strategies of mastering the Nazi past in West Germany shaped transitional justice after 1989/90. Thus, negotiations of collective memory and national identity with regard to Nazi Germany will be related to those discourses on, and practices of, transitional justice which shaped contemporary Germany after the fall of the Berlin Wall.

History of Re-United Germany

In the long run, re-unification changed and challenged all aspects of German society. But the transformation was experienced sooner and more fiercely in the East. The Constitution and laws changed; newspapers, money and brands disappeared, and not a single stone was left unturned in the transformation of the economy, which left hundreds of thousands unemployed or thrown into new professions.[123] Finding a new point of orientation for a forward-looking and inclusive narrative of a cohesive national identity, therefore, became an urgent matter in the spheres of politics, culture and society. Many works have framed their findings as a conflict between top-down public or state-mandated memory and the

[122] So far, the *ZESt* has only been examined in one article, written by its former deputy chief. See Grasemann, Hans-Jürgen: Reanimation eines Fossils. Der Beitrag der Zentralen Erfassungsstelle Salzgitter zur justitiellen Aufarbeitung des SED-Unrechts, in: Stephan, Annegret (ed.): 1945 bis 2000. Ansichten zur deutschen Geschichte – Zehn Jahre Gedenkstätte Moritzplatz Magdeburg für die Opfer politischer Gewaltherrschaft 1945 bis 1989, Opladen: Leske & Budrich 2002, 55-68.
[123] On the transformation of the media landscape, see Bohrmann, Hans: *'The Amalgamation of East German and West German Media, 1989-1995'*, in: Daly, Peter M. et al. (eds.): Germany Reunified. A Five- and Fifty-Year Retrospective, New York et al: Peter Lang 1997, pp. 21-28.

bottom-up collective memory of the wider public.[124] In fact, state-mandated memory has left no doubt as to the moral qualities of both German states. As argued above, all measures of state-mandated memory or transitional justice – be they criminal proceedings, the establishment of memorials,[125] the Bundestag inquiry commissions, or the *Gauck* authority – have relied on the clear normative proposition that the GDR and its regime were reprehensible.

This has also been reflected in the development of central commemorative celebrations of re-unification anniversaries. Initially, these were held quite soberly on 3 October. Ever since, however, both ceremonial acts as well as public broadcasting have grown increasingly festive.[126] Despite commemorative ambiguity, 9 November has effectively become a second, if unofficial, commemoration day. Over the years, the anniversary celebrations have become bigger and bigger. An ostentatious celebration on the twentieth anniversary of the fall of the Wall featured state leaders from the UK, USA, France, and Russia, with the entertainer Thomas Gottschalk as presenter.[127] 9 November 1989 has not come

[124] Beattie: Politics of remembering, 23. Markovits, Inga: '*Selective Memory. How the law affects what we remember and forget about the past – the case of East Germany'*, in: Law and Society Review 35 (2001), 513-563.

[125] Saunders, Anna : '*The Politics of Memory in Berlin's Freiheits- und Einheitsdenkmal',* in: Saunders, Anne / Pinfold, Debbie (eds.): Rembembering and Retinking the GDR. Multiple Perspectives and Plural Authenticities, Houndsmills: Palgrave Macmillan 2013, pp. 164-178. On the controversies about the appropriate handling of GDR monuments and memorials in the Berlin Republic, see Lemmons, Russel: *'"Imprisoned, Murdered, Besmirched": The Controversy Concerning Berlin's Ernst Thälmann Monument and German National Identity, 1990-1995'*, in: Arnold-de Simone, Silke (eds.): Memory Traces. 1989 and the Question of German Cultural Identity, Oxford et al.: Peter Lang 2005, pp. 309–34; Lee, Mia: *'GDR Monuments in Unified Germany'*, in Niven, Bill / Paver, Chloe (eds.):Memorialization in Germancy since 1945, Houndmills / New York: Palgrave Macmillan 2010, pp. 308-17; Griffins, Courtney Glore: *'Reinterpreting the Soviet War Memorial in Berlin's Treptower Park after 1990'*, in: Clarke, David / Wölfe, Ute (eds.): Remembering the German Democratic Republic. Divided Memory in a United Germany, Houndsmills: Palgrave Macmillan 2011, pp. 54-64.

[126] Simon, Vera Caroline: *'Tag der Deutschen Einheit: Festakt und Live-Übertragung im Wandel'*, in: Aus Politik und Zeitgeschichte 2015, B 33-34, pp. 11-17.

[127] Klinge, Sebastian: 1989 und wir. Geschichtspolitik und Erinnerungskultur nach dem Mauerfall, Bielefeld: transcript 2015.

to overshadow the Shoah as a core element of German public memory. It may, however, be seen as *'eine Art stellvertretende Rehabilitierung aller Deutschen'*.[128] Apart, perhaps, from the *Wirtschaftswunder,* with the 'peaceful revolution' of 1989, it is the first time since World War II that a positive story has been canonised in (West) German public memory.

This raises the question of how effective such uplifting celebrations may have been in addressing the country's challenge of finding some degree of national cohesion.[129] As far as this is comprehensible in empirical data, we know that political and citizen apathy is a much bigger problem in the former East than in the West: Church and party affiliations are lower, civil society is weaker, and the potential for political radicalisation is higher. It is only in the days of PEGIDA and the 'refugee crisis' that it becomes clear how fragile civic cohesion is in large parts of the former GDR.[130] In the words of a press officer from Klaus Pohl's play *Wartesaal Deutschland Simmenreich* (1995):

> 'One has to ask whether it's really right that we've basically taken a different system and forced it on these people. I don't know how the "Wessis" would have reacted, whether they would have been able to show as much, let's call it endurance, as some of the "Ossis" have had to have. It's as if the Japanese had invaded West Germany and announced, from tomorrow you are under Japanese law, everything you have been

[128] Calabretta, Costanza: *'Feiern und Gedenken: Zur Entwicklung einer gemeinsamen Erinnerungskultur seit dem 3. Oktober 1990'*, in: Aus Politik und Zeitgeschichte (2015), B 33-34, pp. 3-10.

[129] Thompson, Peter: *'The PDS. "CSU des Ostens?" – Heimat and the Left'*, in: Taberner, Stuart / Finlay, Frank (eds.): Recasting German Identity. Culture, Politics and Literature in the Berlin Republic, Rochester: Camden House 2002, pp. 123-140.

[130] In 1995, Fritz Stern admitted that the degree of alienation between East and West had been tremendously underestimated . See Stern, Fritz, The Many Unifications of Germany, in: Bulletin of the American Academy of Arts and Sciences, 48 (1995), no. 5, pp. 28-42, [p. 33].
On the very recent Dresden-based protest movement ‚Pegida', see the informative study by Vorländer, Hans Herold, Maik/Schäller, Steven: PEGIDA. Entwicklung, Zusammensetzung und Deutung einer Empörungsbewegung, Wiesbaden: Springer VS 2015. For an comprehensive investigation into differences between East and West in the late 1990s, based on a mix of qualitative and quantitative data, see Staab, Andreas: National Identity in Eastern Germany. Inner Unification or Continued Separation?, Westport / London: Praeger 1998.

> doing up until now is irrelevant, whether it's traffic regulations or tax law, even the constitution, forget it!'[131]

Phenomena like *Ostalgie,* a made-up word from *Ost* (East) and *Nostalgie* (nostalgia), the popularity of former GDR brands, or narratives about greater solidarity in the former GDR suggest that joyful perceptions of German reunification do not catch the whole picture.[132] Likewise, it is important to take linguistic concepts like the buzzword *Wende* into account, through which images and narratives are negotiated and established.[133] Recent studies confirm that the magnitude of political, societal, and economic transformation which East Germans experienced can hardly be overestimated:[134] gender roles were challenged on both sides of the former border,[135] and the scale of uncertainty felt by many East Germans can only be gauged, for instance by looking at the steep fall in divorce

[131] quoted in: Staab, National Identity, 1.

[132] Hyland, Claire: *' "Ostalgie doesn't fit!" Individual Interprettations of and Interaction with Ostalgie',* in: Anne Saunders / Debbie Pinfold (eds.): Rembembering and Retinking the GDR. Multiple Perspectives and Plural Authenticities, Houndsmills: Palgrave Macmillan 2013, pp. 101-115; Pence, Katherine / Betts, Paul (eds.): Socialist Modern? East German Everyday Culture and Politics, Ann Arbor: University of Michigan Press 2008; Bach, Jonathan: 'Vanishing Acts and Virtual Reconstructions: Technologies of Memory and the Afterlife of the GDR', in: Arnold-de Simone, Silke (ed.): Memory Traces. 1989 and the Question of German Cultural Identity, Oxford et al.: Peter Lang 2005, pp. 261-80.

[133] Parr, Rolf: *'National Symbols and the German Reunification'*, in: Arnold-de Simone, Silke (eds.): Memory Traces. 1989 and the Question of German Cultural Identity, Oxford et al.: Peter Lang 2005, pp. 27-54.

[134] Most recently, the role of the *Treuhand* has been comprehensively analysed in Böick, Marcus: Die Treuhand. Idee – Praxis – Erfahrung, 1990-1994, Göttingen: Wallstein 2018.

[135] In 1989, 89 per cent of women in East Germany pursued some form of employment. Only three years later, this number had dropped to 55 per cent, with 45 per cent not working, which came much closer to the West German numbers of 40 per cent working, 60 per cent not working in 1992. See Erdmann, Yvonne: 'The Outcome of German Reunification for The West Germans. Three different views', in: Daly, Peter M. et al. (eds.): Germany Reunified. A Five- and Fifty-Year Retrospective, New York et al: Peter Lang 1997, pp. 175-188; For the clash of gender cultures, see also Lang, Sabine: *'Unifying a Gendered State. Women in Post-1989 Germany'*, in: Taberner, Stuart / Finlay, Frank (eds.): Recasting German Identity. Culture, Politics and Literature in the Berlin Republic, Rochester: Camden House 2002, pp. 157-170.

rates in East Germany after 1990, as a current PhD project does.[136] These transformative processes lay at the heart of the country's quest for identity in the 1990s.[137]

* * *

This dissertation contributes to the history of re-united Germany by providing an in-depth case study of the legal repercussions of conflicting claims of legitimacy and criminality between East and West Germany during the Cold War and beyond. Drawing on the theoretical premises of transitional justice research, it aims to fill a gap in the way how historians have hitherto studied the process of post-socialist *Vergangenheitspolitik* by providing a case study of the border guard trials as a measure of transitional justice, and by situating them in the longer history of German efforts of 'coming to terms' with Nazi atrocities.

Structure

Based on primary sources from state and federal governments, chapter 1 will examine the pre-history of the 'border guard cases' by historicising political debates in Cold War West Germany about the criminal nature of border-related killings. The conceptual novelty of this section lies in the demonstration of how these debates and institutional continuities have shaped transitional justice practices in re-united Germany. Chapter 2 will provide the first in-depth analysis of parliamentary proceedings and debates on criminal trials as a transitional justice measure. Chapter 3 will explore popular demands regarding criminal trials in the late GDR by taking a look at correspondence between GDR citizens and the

[136] For an investigation of marriage and divorce before and after reunification, see Schröter, Anja: Ostdeutsche Ehen vor Gericht. Scheidungspraxis im Umbruch 1980-2000, Berlin: Ch. Links 2018

[137] An intriguing study on the popularity of regional fruits show that these searches are not only manifested in written form, but go beyond what can be captured by intellect. See Jordan, Jennifer A.: *'Apples, Identity and Memory in Post-1989 Germany'*, in: Fuchs, Anne/James-Chakraborty, Kathleen/Shortt, Linda (eds.): Debating German Cultural Identity since 1989, Rochester: Camden House 2011, pp. 46-64.

judiciary. Moreover, this chapter will depict judicial practice between November 1989 and October 1990, based on secondary literature. Chapter 4 surveys the judicial practice of post-socialist criminal trials between 1991 and 2005, and provides a detailed case study of trials against former border guards and their military and political superiors. It analyses how the courts attempted to counter the contradictions between political expectations and procedural requirements. Finally, chapter 5 explores how the public has reacted to the trials, and whether they have been successful as a means of transitional justice. This chapter is based on a mix of primary sources: press comments, private letters and opinion polls.

1. Setting the Frame: Law, Politics, and the power of historical continuities, 1961-1989

Stabsgefreiter Fritz Hanke was renowned as an adept rifleman. On 5 June 1962, he received the order to fire on a *Grenzverletzer,* a man trying to breach the Inner-German border near Schierke in the *Harz* mountains. The sergeant who ordered Hanke to fire had already missed the fugitive several times, as had another sergeant – even though they stood significantly closer to the target than Hanke. Hanke aimed at the target's torso – and hit nineteen-year-old Peter Reisch's head. Reisch died five weeks later in a hospital in Magdeburg. Hanke subsequently fled the GDR, but was later identified by West German authorities. He was charged with, and convicted of, manslaughter *(Minder schwerer Fall des Totschlags)* and was sentenced to fifteen months in prison by Stuttgart's regional court (*Landgericht, LG)* in October 1963 (see infra). This case became a precedent – both judicially and conceptually – for West Germany's view of killings at the Inner-German border.[138] This chapter examines how, during the Cold War, the paradigm that GDR government acts could be seen as criminal was established in West Germany and how politicians, courts, and academics have negotiated questions of legality and legitimacy of criminal trials against GDR officials, and how these debates and practices have set the frame for criminal trials as a measure of transitional justice after the fall of Socialism in 1989/90.

[138] Erstinstanzliches Urteil des Landgerichts Stuttgart vom 11.10.1963 – Ks 14/63 –, in: Neue Juristische Wochenschrift 1964, no. 2, pp. 63-69 [p. 63].

The 1960s mark the peak of the first phase of major Nazi trials in West Germany. In the wake of not only the Ulmer Einsatzgruppenprozess in 1958 and the first Auschwitz trial in 1963-65, but also the widely-publicised Eichmann trial in Jerusalem, the period of re-integration and assimilation of former Nazi officials and perpetrators had come to an end–at least to a certain extent.[139] In the mid to late 1940s, criminal trials against former Nazis had arguably been a case of foreign law: the Nuremberg trials were conducted based on norms of Public International Law which had not existed until those very trials. Likewise, the Denazification trials were considered equally intrusive into German society. Since the late 1950s, however, criminal trials had become an integral means of confronting the Nazi past in West Germany. Assigning not only symbolic, but also personal, responsibility for grave crimes became an important strategy of 'mastering' the Nazi past.[140]

At the same time, all facets of the German question were subjected to a major political re-alignment; a broad consensus emerged in the early 1960s after the SPD addressed these issues. In the early 1950s, and especially after the Stalin Note of March 1952,[141] the SPD rejected Adenauer's policies of re-gaining sovereignty by establishing firm ties to the Western powers. Social Democrats believed that *Westbindung* sacrificed German unity, and hence rejected the Paris Treaty of 1954 that sought to establish the European Defence Community (EDC). They also rejected the General Treaty of 1952 which established West Germany's – albeit limited – sovereignty. In 1959, however, the party approved new fundamental policy statements (Grundsatzprogramm). This *Godesberger Programm* marked the

[139] Still leading in the history on how West German courts and politics unwound Denazification and how they served the integration of former Nazi officials, see Frei, Vergangenheitspolitik.
[140] On the Nuremberg Trials, see Weinke, Nürnberger Prozesse. On the Auschwitz Trial, see Wittmann, Justice and Pendas, Trial. On the Eichmann Trial, see Lipstadt, Deborah E.: The Eichmann Trial, New York: Nextbook/Schocken 2011.
[141] Conze, Eckhart: Die Suche nach Sicherheit. Eine Geschichte der Bundesrepublik Deutschland von 1949 bis in die Gegenwart. München: Siedler 2009, pp. 66-83; Wolfrum, Edgar: Die geglückte Demokratie. Geschichte der Bundesrepublik Deutschland von ihren Anfängen bis zur Gegenwart, München: Pantheon 2007, 113-120.

culmination of a gradual re-formulation of Social Democratic political values as well as concrete policy ideas. This programme became a turning point in the party's self-identity and its role in West German politics. The central revolution on matters of foreign policy was formulated by Herbert Wehner on 30 June 1960 in a famous Bundestag speech. Herbert Wehner, then deputy chairman of the SPD as well as influential chairman of the parliament's committee on *Gesamtdeutsche und Berliner Fragen* and head of the SPD's committee for foreign policy and *Gesamtdeutsche Fragen,* conceded that the Social Democrats would henceforth tolerate Adenauer's policy of *Westbindung* while continuing to fight for German unity.[142] For almost ten years – until Willy Brandt took office as Federal Chancellor in 1969 – all major parliamentary forces in West German politics supported Adenauer's course of establishing firm ties to the Western powers while maintaining the long-term goal of German unity, as well as claims of *Alleinvertretung.*

In this decade, which also witnessed the equation of Socialism and Nazism in the term *totalitarianism,*[143] the criminal law was a key concept in West Germany for framing and reacting to GDR government act which violated common-sense perceptions of justice. This consensus was first expressed in autumn 1961, when the *Zentrale Erfassungsstelle der Landesjustizverwaltungen* was established in Salzgitter. Its tasks touched upon questions of legality, legitimacy and diplomacy; hence, it is unsurprising that this institution would soon become contested. However, in the autumn of 1961, after the first dead had to be mourned at the Berlin Wall, there was broad consensus in establishing the office.

---

[142] Groh, Dieter/Brandt, Peter: 'Vaterlandslose Gesellen'. Sozialdemokratie und Nation 1860-1990, München, C.H. Beck 1992; Hacker, Jens: *'Die deutsche Frage aus der Sicht der SPD'*, in: Blumenwitz, Dieter/Zieger, Gottfried (eds.): Die deutsche Frage im Spiegel der Parteien, Köln: Verlag Wissenschaft und Politik 1989, pp. 39-66.

[143] Vollnhals, Clemens: *'Der Totalitarismusbegriff im Wandel',* in: Aus Politik und Zeitgeschichte 2006, B 39, pp. 21-27.

Erik Blumenfeld, leader of Hamburg's CDU parliamentary group, was the first to mention a special prosecutor's office for GDR government crimes in early September 1961. He proposed to assign this task to the *Zentrale Stelle der Landesjustizverwaltungen in Ludwigsburg*, an office originally designed to support and facilitate investigations against former Nazi perpetrators.[144] West-Berlin's mayor Willy Brandt (SPD), picked this idea up. On 5 September 1961, he sent a telegram to West Germany's other Ministerpräsidenten, suggesting the establishment of an office that aimed at providing 'the organisational basis for a uniform West German prosecution *'...der Untaten der Gewalthaber der SED (...)',* possibly, and for the time being, only in order to secure evidence.[145] This referred to those 'organs and agents of the Pankow regime (the GDR government, PE) who had committed crimes (sic!) in relation to the most recent violent acts'.[146] Its purpose was to clearly demonstrate that all deeds were recorded and brought to justice. Notably, Brandt used the term ‚crimes' in an every-day manner, arguably communicating an ideological framing, but also uncritically implying that border-related violent acts had – or could – be seen as 'criminal' under West German law. Brandt also followed Blumenfeld's proposal in suggesting that this task be assigned to the *Zentrale Stelle der Landesjustizverwaltungen* in Ludwigsburg. Brandt posited a remarkable equalisation of the GDR regime with Shoah, euthanasia, and other Nazi crimes. In his words, he identified a *'nahezu völlig[e] Identität der jetzt vom SED-Regime in der Zone und in Ostberlin angewandten Methoden mit denen des Nationalsozialismus'*[147]*,* which is surprising given his later policy of détente.

From 25-27 October 1961, the West German Ministers of Justice (*Länder* and federal level) convened at the *Justizministerkonferenz (conference of Ministers of Justice)* in Wiesbaden where they discussed, among other things, Brandt's proposal

[144] 'Aktenvermerk des Bundesministeriums der Justiz vom 9. September 1961', BArch B 141 / 33783, pp. 6-7.
[145] BArch B 141 / 33787, p. 3.
[146] ibid.
[147] ibid.

and the details of such an authority. Baden-Württembergs Justice Minister, Wolfgang Haußmann (FDP), suggested assigning the task to a *Generalstaatsanwalt* or *Oberstaatsanwalt* in Niedersachsen. Hessen's Ministerpräsident and Justice Minister, Georg-August Zinn (SPD), emphasised the important psychological role of the office, and West-Berlin's justice senator additionally hoped that a visible central authority would deter 'many' *Volkspolizisten* from committing violent acts, out of fear of prosecution in the West. Federal Minister of Justice Fritz Schäffer (CDU) made what appeared at the time to be a theoretical point: the acts in question constituted *crimes* in a legal sense (*Offizialdelikte*) – as opposed to less severe forms of breaching the law (e.g. *Vergehen)* – and would oblige public prosecutors to investigate. These remarks reflected a broad consensus on the question whether public prosecutors ought to keep a record of alleged GDR government crimes. Hence, eventually, the Justice Ministers voted unanimously in favour of an independent office, and requested Lower Saxony's Justice Minister to establish such an office on their behalf.[148]

In this light, and following the request of his colleagues, Lower Saxony's Justice Minister, Arvid von Nottbeck (FDP), established the *Zentrale Erfassungsstelle* in Salzgitter on 15th November 1961.[149] Its tasks were defined as 'to record the acts of violence committed in connection with the political events of recent months in East Berlin and in the Soviet Zone and to ensure that they can be atoned for in due course'.[150] This included collecting information and securing evidence for all such acts which did not fall into the jurisdiction of a local prosecutor's office in the Federal Republic or in West-Berlin.[151] Paragraph 5 stated that, if a local

[148] 'Auszug aus der Niederschrift über die Beschlüsse der 29. Konferenz der Justizminister und Senatoren vom 25.-27.10.1961 in Wiesbaden', BArch B 141 / 33783, pp. 108-113.
[149] 'Aktenvermerk des Niedersächsischen Ministers der Justiz vom 15.11.1961' (4010 III A2. a 6 – 602/61), BArch B 141 / 33783, p. 127.
[150] '(…) die im Zusammenhang mit den politischen Ereignissen der letzten Monate in Ost-Berlin und in der SBZ begangenen Gewaltakte festzuhalten und dafür Sorge zu tragen, daß sie zu gegebener Zeit gesühnt werden können.', ibid. § 1.
[151] ibid., § 4.

prosecutor's competence could be identified – or would be established by the Federal Court of Justice (BGH) at a later point in time – the Office had to forward the documents to the competent office.

The institutional set-up and work of the Central Registration Office

When we study the office's routine reports to Niedersachsen's Minister of Justice, it becomes evident that the Central Registration Office was a foreign body, so to speak, in the Federal Republic's legal system. Other than normal prosecutors, the institution's work was impeded by a lack of evidence and witnesses – in most cases, witnesses, victims, and evidence remained on East German soil and could only be gathered and registered very slowly.[152] Its legal competences were limited in that it could not bring charges; it had to rely on local state prosecutors to do that. Thus, the *ZESt's* primary task was to collect and register pieces of evidence until arraignment could be justified. Then a case could be submitted to the *Generalbundesanwalt* with the request to assign a competent local prosecutor in accordance with § 13 a StPO. Another aspect rather alien to normal judicial proceedings was that the *Landesjustizverwaltungen* were asked to forward information on all relevant preliminary and court proceedings to the Central Registration Office so that the Office could get an overview on all activities in its field, even if a local jurisdiction had already been established in the Federal Republic.[153] When discussing how the Central Registration Office gained its information, the director argued that it worked less like a law enforcement agency and more like a '*Nachrichtensammler'*. Its sources were: reports of Berlin's police superintendent; daily reports of the *Grenznachrichtensammelstellen* (Offices for collecting news on the border) in Niedersachsen, Schleswig-Holstein, Hessen and Bayern; the German border police (Bundesgrenzschutz, BGS); financial authorities; federal police authorities and secret services like the Federal Criminal

[152] 'Erfahrungsbericht' 4 October 1962,in: BArch B 141 / 33786.
[153] ibid. This contrasted with the original decree establishing the office, s. supra.

Police Office (*Bundeskriminalamt*, BKA), the Federal Office for the Protection of the Constitution (*Bundesamt for Verfassungsschutz*, BfV) and federal ministries; daily newspapers, and, lastly, clues from East German citizens.[154]

The director also discussed the office's effect and previous successes. Despite the lack of any previous convictions, he claimed it could be hoped that offensive PR work might deter border guards from further killings. In this diplomatic respect, the office's role far exceeded that of a normal judicial office. It also aimed at collecting material like the *Schießbefehl*, as well as testimony regarding oral orders such as 'ten dead at the Wall better than one fugitive in the West'.[155] This, along with secret service information, could later help to identify *Schreibtischtäter* as the ones carrying out violent acts which were merely considered to be tools of their regime. Notably, he drew a parallel to contemporary trials against former Nazi perpetrators, arguing that the same insight guided these proceedings.[156]

But the Central Registration Office was not only a foreign body in West Germany's legal architecture. It was also perceived as something else: more than a mere technical judicial office. It was seen as a contact point for all sorts of testimonies and lamentations about the socialist regime in East Germany, exceeding the *ZESt*'s initially rather limited field of competence. In his first report, the office's head discussed how numerous citizens reported unjust acts committed by GDR authorities which were seen as a 'general expression of [the GDR's] *Unrechtsherrschaft.'*[157] This often included abuse of justice, physical abuse by police and *Stasi* officials*,* torture, and extortion. Although the desire for atonement was quite evident, the *ZESt's* head deplored that the office had no competence to deal with the issues brought forward. This rather narrowly-defined field of competence was due to a specification of the authority's sphere of competence

[154] ibid.
[155] 'Besser zehn Tote an der Mauer als ein Flüchtling im Westen', ibid.
[156] ibid.
[157] ibid.

which had become necessary after its establishment. According to the institutional head's first report, violent acts were being registered which aimed at sustaining and supporting the rulers' measures against the free movement of persons.[158] The only acts which were seen as violent for the purpose of the *ZESt's* work were those committed by humans against humans. The more general political pressure coming from the regime had to be excluded. Hence, 'violent acts', as mentioned in the decree which established the office, were defined as 'particularly brutal assaults of predominantly armed organs of the SBZ, committed in and around Berlin or at the *Zonengrenze* (Inner-German border), when these acts violate the basic right (sic!) of free movement.'[159]

Statistics from the office's work during the initial years of its activity reveal a significant discrepancy between proceedings initiated and cases that could be submitted to the *Generalbundesanwalt* and subsequently to an ordinary prosecutor. In 1962, 940 proceedings were launched, and only five were submitted for further investigation and possible arraignment.[160] Evidently, the office's work was not effective in the short run, as numerous proceedings generated only few outcomes. This made the trial against Fritz Hanke in Stuttgart in October 1963 all the more important, as it became the first, attention-grabbing trial against a former GDR border guard. For the first time, the Central Registration Office's work would come to fruition.

* * *

Until the opening of the trial against Fritz Hanke, the work of the Central Registration Office had been predominantly symbolic. Legal, moral or political challenges to the claim of punishability of violent acts by GDR border guards – or

[158] '[freizügigkeitsfeindliche Maßnahmen]', ibid.
[159] 'besonders brutale Übergriffe vornehmlich bewaffneter Organe der SBZ, die im Bereich der Berliner Sektorengrenze (…) begangen worden sind, wenn durch sie das Grundrecht der Freizügigkeit in irgendeiner Form verletzt worden ist.' ibid.
[160] ibid.

other GDR officials – had remained a secondary concern. The institution and its work had served West Germany's political and societal need for ideological clarification and demarcation, and had answered a comprehensible demand for common-sense justice. In the Hanke case, however, Stuttgart's regional court had to find justifications for convicting Fritz Hanke under West German law, which proved a challenge. The criminal code and, more importantly, the Basic Law (Grundgesetz, GG), West Germany's constitution, prohibit retroactive punishment (Art. 103 (2) GG; §1 StGB). This made it impossible to prosecute a person for a deed that had not been criminal at the time of the act. So the key question was: why would Hanke's shooting have been criminal all the while? Both this question, and the defendant's response to it, turned out to resemble judicial challenges faced by contemporary criminal trials against former Nazi perpetrators.

Not surprisingly, Hanke claimed that he had acted under orders. For the LG Stuttgart to be able to punish Hanke under West German law, justification had to be found for disregarding his command, which not only granted him permission to use his weapon, but obliged him to do so. In short, the court found three arguments in three different sources of law for justification of punishment: firstly, the prohibition against trespassing over the Inner-German border would violate the West German constitution and could consequently not be accepted; secondly, the prohibition would even conflict with the East German constitution; thirdly, it violated supra-positive human rights.[161]

In the media, the Hanke case, and the role of the *ZESt* as the most visible embodiment of West Germany's claim to moral and legal superiority over the GDR, had been received with broad approval. However, the changing international scene

[161] Erstinstanzliches Urteil des Landgerichts Stuttgart vom 11.10.1963 – Ks 14/63 –, in: Neue Juristische Wochenschrift 1964, no. 2, pp. 63-69.

led to both major political camps in West Germany slowly drifting apart over the German question.

In previous years, the international system had been constantly fragile. The construction of the Berlin Wall, for instance, had marked the conclusion of continuous crises in the relationship between the West and the East, with the preliminary climax of a confrontation between American and Soviet tanks in October 1961.[162] This development had even been surpassed in October 1962 with the Cuban crisis, when the United States and the USSR were on the brink of nuclear war. Against this backdrop, U.S. president John F. Kennedy increasingly sought détente with the Eastern powers.[163] This also spilled over into German politics, and led to a gradual stratification in matters of *Deutschlandpolitik.* During the 1965 Bundestag election campaign, for instance, SPD-front runner Willy Brandt suggested negotiating a peace treaty which included the USSR if he were elected chancellor.[164] After his bid was unsuccessful, he became Foreign Minister in Kurt Georg Kiesinger's (CDU) 'Grand Coalition'. In this role, Brandt sought a *rapprochement* with the Eastern powers in order to normalise relationships. Initially in secret, Brandt's foreign policy increasingly made it clear to the public that the federal government – and, more importantly both major *Volksparteien* – increasingly disagreed on the German question. For example, as early as 1968, Willy Brandt suggested that the Federal Republic should recognise the *Oder-Neiße-Grenze,* thereby recognising the irrecoverable loss of the Eastern territories which were now part of Poland.[165]

[162] On the confrontation in Berlin 1961, see Kempe, Frederick: Berlin 1961. Kennedy, Khrushchev, and the Most Dangerous Place on Earth, New York: G.P. Putnam's Sons 2011.
[163] Conze, Sicherheit, 296-09.
[164] Braunthal, Gerald: The German Social Democrats since 1969. A Party in Power and Opposition. Boulder et al.: Westview Press 1994, pp. 321f.
[165] Ibid, 320-22.; Hacker, Frage, 54.

An Academic Debate

With this political consensus eroding, it is little wonder that the verdict in the Hanke case, and the plausibility of those legal assumptions underpinning the judgement, were equally called into question within the legal academy. Initially, Gerald Grünwald, a law professor at Bonn University, opened the debate with fierce criticism of the court's reasoning in the Hanke case in 1966. Grünwald endeveaoured to prove that border-related shootings and similar acts on East German soil could not be criminal under West German law. He contended that it was legally impossible under West German laws to prosecute either GDR officials who had issued the *Schießbefehl,* or border guards who acted on it. Following his article, a controversy arose in the legal academy as to whether or not the GDR government could be punishable under West German law.

The legal debate centred on the four arguments that Stuttgart's regional court had relied on in its verdict on Hanke in order to establish its own competence: the positive law of the GDR; the question of the GDR's sovereignty; the validity of West Germany's basic law for East German officials, and the relationship between codified/written (positive) and unwritten natural (supra-positive) law.

As for the violation of supra-positive human rights, the question was how such supra-positive rights could be ascertained. The court in Stuttgart had argued that the freedom to leave one's country was part of the 'the inviolable foundation and core of the law as it lives in the legal consciousness of all civilised peoples'.[166] Grünwald argued that the Universal Declaration of Human Rights (UDHR), which indeed acknowledges a right to leave any country including one's own (Art. 13 (2)), was merely an expression of political intentions and not legally binding. [167] Consequently, the prohibition against leaving the GDR without a passport would

[166] 'unantastbaren Grundstock und Kernbereich des Rechts, wie er im Rechtsbewusstsein aller Kulturvölker lebt', Erstinstanzliches Urteil des Landgerichts Stuttgart vom 11.10.1963 – Ks 14/63 –, in: Neue Juristische Wochenschrift 1964, no. 2, pp. 63-69.

[167] Grünwald, Gerald: *'Ist der Schußwaffengebrauch an der Zonengrenze strafbar?',* in: JuristenZeitung 21 (1966), no. 19, pp. 633-38, [pp. 636f.].

not violate supra-positive natural law. Walter Rosenthal was the head of the *Untersuchungsausschuß freiheitlicher Juristen,* an influential non-governmental organisation that had documented Soviet and GDR state crimes in East Germany since 1949, long before the *ZESt* was established.[168] Rosenthal defended the court in assuming that the reference to Art. 13 (2) UDHR was the only evidence for the assumption that freedom to leave the country (*Ausreisefreiheit)* indeed formed part of that 'core area of the law' (*Kernbereicht des Rechts).* There was no need for the Declaration to be a binding law with direct effect; violent acts at the border would violate supra-positive law, according to Rosenthal. [169] Another question was whether such a norm of supra-positive law could trump a legally-positive permission ('*Erlaubnissatz'*). For Grünwald, punishability could not be based on rules of natural law. The basic principle of *nullum crimen, nulla poena sine lege* (no crime, no punishment without a previous penal law) held that the criminal liability had to be established *in statute.* 'Whoever acts in accordance with positive statutory laws cannot be punished', was Grünwald's conclusion.[170] Rosenthal came to a different conclusion. In his rather legalistic argumentation, punishability was already a given in positive GDR law, which resembled the relevant paragraphs in the Federal Republic. For him, the contested point was whether a positive *Erlaubnissatz* could be valid if it violated supra-positive law. Thus, the prohibition of retroactive punishment – both a basic legal principle and as a constitutional provision in West German law – would not even apply in this case.[171]

Seeking an additional layer of legitimacy, the LG Stuttgart had argued in the Hanke case that the prohibition to trespass the Inner-German border would even violate the GDR constitution. The court referred to Article 8 of the GDR

[168] Mouralis, épuration, pp. 226-30.
[169] Rosenthal, Walter: 'Zur Strafbarkeit des Schußwaffengebrauchs an der Zonengrenze', in: Recht in Ost und West (ROW) 11 (1967), pp. 7-11.
[170] 'Derjenige, der sich dem positiven Gesetzesrecht gemäß verhält, kann nicht bestraft werden.', Grünwald, Schußwaffengebrauch, 637.
[171] Rosenthal, Strafbarkeit, 11.

constitution, which held that everyone had the right to settle in any place. According to the GDR constitution, such a basic right could only be limited by a law and could not infringe upon the core of the right itself. The contested point, of course, was whether the prohibition to leave the country violated the right itself. The court and Grünwald disagreed on this issue, and Grünwald argued that it was not the court's place to decide on the constitutionality of GDR laws and orders – nor was it appropriate to prosecute officials who act on a rule that might violate the constitution.[172] Grünwald remained the only author studying East German law with this level of scrutiny, as most other authors were perhaps still – or already – very much influenced by the assumption that GDR powers and laws were illegal and illegitimate.

As for the question of whether the Basic Law demanded punishment, it was crucial to define how West and East Germany would relate to each other legally. The central question was whether East Germany could be seen as *Inland* or not. To legally communicate between different legal systems, two legal doctrines could be applied: either international criminal law or unwritten inter-local law *(interlokales Recht)*. The former regulates how courts deal with perpetrators of a crime committed on foreign soil; the latter defines how this can be done in a unitary state with regionally differing criminal laws. In both cases, the law of the crime scene plays a central role in ascertaining punishability, as well as any penalties. The question, then, was which aspects of GDR law could be disregarded under the Basic Law, and how. Not doing so would have had the perverse consequence of West German courts sentencing East Germans for *Republikflucht* – an obviously undesirable and unimaginable scenario.[173] In international criminal law, the legal principle of *ordre public* constitutes a legal safeguard against such absurd outcomes. In effect, it means that, for a deed committed in country A to be punishable in country B, the act had to be criminal in both countries. Otherwise,

[172] Grünwald, Schußwaffengebrauch, 635f.
[173] Grünwald, 634-635.

county B's *ordre public* would protect the accused from unjust laws if they violated the country's fundamental legal values. Now, while this was uncontested in international criminal law, it was not so clear in inter-local criminal law, which hitherto had been the basis for cases where East Germans were accused in West German courts.

Now, the point in question was whether the Basic Law's fundamental principles, the West German *ordre public,* could intervene only in order to protect a perpetrator – as with the case of *Republikflucht,* where East German law would be suspended – or whether it could *also* intervene at the expense of a culprit, that is, make a deed punishable that would not be criminal under East German law. While Grünwald denied this, Rosenthal was positive that the *ordre public* could justify charging a GDR official as well.[174] Moreover, Rosenthal and Niewerth believed that the *ordre public* would not only correct statutory offenses, but also statutory permissions [*'Erlaubnissätze'*]. Thus, if a permission under GDR law had to be disregarded under West German law, a culprit would be punishable under both German laws, as his permission in East Germany would be inapplicable.[175]

A final question was put forward by Hans Hermann Dichgans, a Christian-Democrat politician and member of Bundestag. In essence, he came to the same conclusion that Grünwald had reached earlier: GDR regime actions could not be criminal under West German law. However, he derived this from his argument that any laws and any political or actual power in the GDR still derived from the USSR as the occupying power, and would therefore be exempt from West German jurisdiction.[176]

The relevance of this debate was that it not only called into question the legality and legitimacy of the verdict against Fritz Hanke, but also, and perhaps more

[174] Rosenthal, Strafbarkeit, 9f.
[175] ibid.
[176] Dichgans, Hans: '*Zur Rechtsnatur des mitteldeutschen Regimes'*, in: Neue Juristische Wochenschrift 1966, no. 48, pp. 2255-57.

importantly, challenged the role of the *ZESt*. More broadly, this debate marks a point at which the normative ideological concept of the unlawfulness and illegitimacy of the GDR became contested in the legal sphere, as well as the point at which West Germany's legal profession started to accommodate itself to the idea of a more permanent German division.

* * *

This contestation soon spilled over into the political sphere, where it became all the more relevant. In April 1967, Peter Schulz (SPD), Hamburg's Minister of Justice, asked the state secretary in the Federal Ministry of Justice, Horst Ehmke (SPD), how the effects of the *ZESt* on Inner-German relations could be assessed, and whether the office would have any deterrent effect on GDR border guards and other officials.[177] Ehmke affirmed the necessity of assessing the work of the *ZESt*, and forwarded the question to the Federal Minister for Questions concerning Germany (*gesamtdeutsche Fragen)* (BMG), Herbert Wehner (SPD).[178] In May 1967, Niedersachsen's Justice Minister, Gustav Bosselmann (CDU), urged the Federal Minister of Justice, Gustav Heinemann (SPD), to make a statement regarding the legality of the Central Registration Office, as this had recently been questioned in public after the publications of Grünwald's and Dichgans' articles.[179]

In a letter dated 24 July 1967, Federal Minister for *gesamdeutsche Fragen,* Herbert Wehner (SPD) asked the Federal Ministers of Defence and of the Interior to comment on the question of whether the Central Registration Office should be dissolved. The answer to this question, Wehner continued, would also depend on legal questions regarding the culpability of the use of firearms by *'mitteldeutsche*

[177] Letter from Peter Schulz to Horst Ehmke, Federal Ministry of Justice, 21 April 1967, BArch B 141 / 33785.
[178] Memo of the Federal Ministry of Justice, 7 May 1967, BArch B 141 / 33785, pp. 7. This contains a memo for the Federal Minister.rovided by RD Götz on 7 June 1967, approved by the state secretary.
[179] Letter from Niedersachsen's Justice Minister to the Federal Minister of Justice, 22 June 1967, BArch B 141 / 33785, p. 11.

Grenzposten an der Demarkationslinie'. Wehner added that he believed that arguments against the office's closure were currently more convincing.[180]

In order to enable an informed and serious debate, the Federal Ministry of Justice produced a twenty-nine page memorandum which discussed the different legal arguments surrounding the key question of the culpability of border-related shootings on East German soil before West German courts. This text discussed the concurring arguments presented by the aforementioned legal scholars in academic journals over the past months, and the jurisprudence of German courts in relevant cases. This paper reflected a surprisingly high degree of respect for – or at least implicit acceptance of – the GDR's laws and constitution, which stands in sharp contrast to the ideological demarcation still sought by West German politicians in the 1960s, in some cases up until 1989. In some sense, this already foreshadowed Willy Brandt's *Neue Ostpolitik* and the general period of *détente* of the 1970s, even though the *Staatssekretär* was still disposed to insert inverted commas every time the GDR was named as *DDR.* This paper was presented to the Federal and *Länder* Ministers of Justice and some other federal ministries, and provided the basis for a meeting in August 1968.[181]

On 20 August 1968, civil servants of the Federal Ministry of Justice met the *ZESt's* head and representatives of West German *Landesjustizverwaltungen.* In their meeting, they discussed legal questions concerning the still-contested punishability of the killings at the Inner-German border.[182] According to the minutes, the meeting was mostly characterised by consensus. The participants were astonishingly concerned with taking East German law seriously, given the still contested

[180] Letter from the Federal Minister of All-German Affairs to the Federal Minister of Justice, 24 July 1967, BArch B 141 / 33785, p. 12.
[181] Dossier 'Zur Strafbarkeit des Schußwaffengebrauchs an der Zonengrenze', in: BArch B 141 / 33785, pp. 14-42 and 43-70. This undated document was probably circulated between mid-September and early October 1967, cf. [p. 108].
[182] 'Niederschrift über die Referentenbesprechung vom 20. August 1968 im Bundesministerium der Justiz zur Frage der Strafbarkeit von Handlungen, die in der SBZ begangen wurden', in: BArch B 141 / 33785, pp. 127-135.

statehood of the ‘SBZ’. They agreed that not all means of control and coercion which were used in order to enforce the prohibition against leaving the GDR could be seen as standing in conflict with supra-positive law. This included warning shouts, warning shots, arrests, and bodily harm. They did, however, agree that intentional homicides violated 'the core area of the law'.[183] Likewise, it was agreed that the prohibition against leaving the GDR ('*Republikflucht'* in the language of the GDR) was in accordance with the GDR's new constitution of 1968. Thus, a judge who convicted a GDR citizen of '*Republikflucht'* and passed down a non-excessive sentence would not be perverting justice.[184] In essence, the meeting agreed that the scope of competences of the Central Registration Office was to be limited. This referred to an extension of tasks that had happened in 1963, when violent acts committed *in* the GDR were also especially included in the *ZESt's* lists of tasks.[185]

Consequently, Niedersachsen's Justice Minister, Gustav Bosselmann (CDU), restricted the scope of the *ZESt*'s remit. Henceforth, only the following cases of ‘violent acts’ were to be recorded by the Central Registration Office and deemed punishable under West German law:[186] killings at the border, and killings with the aim of enforcing the regime's aims, if they violated human dignity; 'terror judgements'[187] were also included, understood as verdicts which handed down excessive punishments which allegedly conflicted with basic principles of humanity (*Menschlichkeit*). Also, abuses during preliminary investigations, as well as during arrest, were still monitored, if they ‘can be recognised as an expression of the politically violent system of the SBZ’.[188] Lastly, acts which justified suspicions of

[183] ‘den Kernbereich des Rechts’, ibid., 131.
[184] ibid., 133f.
[185] Letter from Niedersachsen's Minister of Justice to the Federal Minister of Justice, 24 January 1969, BArch B 141 / 33785, pp. 106-111.
[186] ibid.
[187] 'Terrorurteile', ibid.
[188] ‘Ausdruck des politischen Gewaltsystems’, ibid.

genocide (§ 220a StGB), displacement (§ 234a StGB) or political harassment (§241 StGB) were also included.[189]

The legal debate sparked by Grünwald, and the ensuing administrative discussions, were yet another turning point in West German conceptions of how to relate legally to violent acts committed by GDR authorities. On the one hand, this discussion took place between public servants – not between politicians. Apparently, the issue was still deemed a rather technical and uncontested question. Moreover, the debate was largely defined by consensus. In this sense, the debate concerning the future of the Central Registration Office, and, more broadly, about how the Federal Republic would view and position itself in relation to abusive acts by the GDR, and whether criminal prosecution was legal and legitimate, did not appear to be a matter of politics. On the other hand, however, this technical debate also marks the first time that the paradigm of punishability was called into question in the political-administrative sphere, albeit only by a minority at this stage. Over the next two decades, however, *Deutschlandpolitik* in general, and views on punishability and the Central Registration Office in particular, became subject to an ever-widening divide along party lines.

Neue Ostpolitik and the Politicisation of the *ZESt* in the 1980s

Enthusiasm or brusque outrage, respectively, had fuelled West Germany's political culture since Willy Brandt and Walter Scheel had initiated the *Neue Ostpolitik* in 1969. The country experienced a period of polarisation and politicization, and hundreds of thousands of people joined political parties. This was sparked by the new government's *Neue Ostpolitik,* a careful redefinition of West Germany's attitudes towards the German question with respect to the *Ostgebiete* in post-1945 Poland, as well as its diplomatic relations with countries in

[189] ibid.

the Warsaw Pact. A series of treaties established diplomatic relations, launched several forms of cooperation and, all in all, sought to establish a sense of security and trust in the relationship between East European states and the Federal Republic.[190] A series of treaties was signed towards this end, with the USSR (1970), Poland (1970), and the CSSR (1973), as well as a series of treaties between the FRG and the GDR, aimed at relaxing Inner-German relations and enabling easier contact between families on both sides of the border.[191]

This *Neue Ostpolitik* carried the Social-liberal government of SPD and FDP to a sweeping victory in the Bundestag elections of 1972. In 1974, Willy Brandt resigned his chancellorship unnecessarily after an East-German spy was detected working in his personal office. Helmut Schmidt (SPD), who took over the chancellery, struggled both to gain as much popularity as Brandt, and to maintain public support for his policies. The 1973 oil crisis and the subsequent termination of the Bretton-Woods-System had brought the *trente glorieuses* to an end; it had been a period of unprecedented stability and economic growth, and Western Europe had witnessed an increase in wealth. The following period of stagflation – a stagnation of economic growth with simultaneous inflation of prices – made it increasingly difficult to meet societal conflicts with an increase in public expenditure.[192]

On the international plane, a series of events led to an aggravation of the bloc confrontation since the late 1970s. The Soviet intervention in Afghanistan in December 1979 fostered the fear that the USSR would aggressively seek to

[190] For international views and responses to Neue Ostpolitik, see Fink, Carole/Schaefer, Bernd (eds.): Ostpolitik, 1969-1974. European and Global Responses, Cambridge, Cambridge University Press 2009.

[191] Conze, Sicherheit, 425-53; Wolfrum, Demokratie, 283-314.

[192] ibid. For an in-depth study of social and economic transformations in the late 20th century, see Doering-Manteuffel, A. and L. Raphael (2008). Nach dem Boom. Perspektiven auf die Zeitgeschichte seit 1970. Göttingen, Vandenhoeck & Ruprecht. More recently, see Doering-Manteuffel, A., L. Raphael and T. Schlemmer, Eds. (2016). Vorgeschichte der Gegenwart. Dimensionen des Strukturbruchs nach dem Boom. Göttingen, Vandenhoeck & Ruprecht.

maintain and extend its mode of rule. Just a few weeks earlier, the NATO states had taken a massive step in order to keep up with increasing numbers of Soviet intermediate-range missiles. The NATO Double-Track decision of 12 December 1979[193] threatened the Eastern bloc with the deployment of more middle-range nuclear weapons in Western Europe if the Warsaw pact declined mutual nuclear arms control. Lastly, the growing opposition movement of *Solidarity* in Poland alarmed East German leaders, hinting at the possibility of an uprising in the GDR.

All these developments entailed a deterioration of the international climate and further complicated the policies of *détente*. The Inner-German *Entspannung* had already lost its verve since the mid-1970s, and the Schmidt government's push for the NATO Double-Track decision led to an insurmountable polarisation within the SPD. Parts of the party, including the party's youth organisation *Jusos,* intended to maintain *détente* even in the altered international climate, while other parts of the party supported Schmidt's push for a nuclear balance in Europe.[194]

In the GDR, the Honecker government sought to stabilise its own reign by halting further personal and cultural exchange between West and East. To this end, the minimum amount of change *(Mindestumtausch)* to be obtained by Western visitors to the GDR was doubled in order to reduce the number of day tourists, especially those from West-Berlin. Moreover, in a speech made on 13 October 1980 in Gera, Honecker set four demands to be met by the Federal Republic as a necessary precondition for any further steps of cooperation and relaxation in Inner-German relations. The GDR government justified these measures with the NATO double track decision, but they rather served the hope of preventing the rise of an opposition movement similar to the Polish Solidarity movement.[195]

[193] Conze, Sicherheit, 536-44.
[194] ibid.; Braunthal, Social Democrats, 323
[195] Zimmer, Matthias: Nationales Interesse und Staatsräson. Zur Deutschlandpolitik der Regierung Kohl 1982-1989. Paderborn: Ferdinand Schöningh 1992, pp. 50-52.

In his speech, Honecker had demanded that West Germany fully recognise and respect East German citizenship by halting its policy of giving out West German passports to East German refugees; moreover, he demanded that the *Ständige Vertretungen* (permanent representations/missions) be upgraded to full embassies. Thirdly, the border should be determined in the middle of the river *Elbe,* a claim that remained contested between Bonn and Ost-Berlin. Finally, he demanded that the *ZESt* be closed. In essence, the Gera demands came down to the expectation of a full recognition of the GDR under public international law. This would have transformed the unique Inner-German relations into ordinary international relations.

In Bonn, the Gera demands were met with reservation. Helmut Kohl (CDU), who in 1980 was still leader of the opposition, made it clear that these demands could not be the basis of Inner-German relations. Helmut Schmidt, forced to a more pragmatic approach by his office as chancellor, discussed the Gera demands with Erich Honecker during his visit to the GDR from 11-13 December 1981. In the joint communiqué, Bonn and East-Berlin acknowledged that they had not been able to reach a consensus on fundamental questions, including those brought up by the Gera demands. However, these disputes would not be a precondition for further developments in Inner-German relations. Within 14 months, the Gera demands had already become a toothless tiger.[196]

After the Liberal Democrats had changed sides and had elected Helmut Kohl (CDU) chancellor to oust Helmut Schmidt, the Kohl government maintained the social-liberal governments' policy of relaxation with the East by securing what had been achieved – just as Schmidt had done since the decline in international *detente* since 1979.[197] This was certainly encouraged by the personal continuity of Hans-Dietrich Genscher as Foreign Minister. What changed in Bonn was the rhetoric

[196] ibid. For the original text, see 'Dokumente zur Deutschlandpolitik', ed. by Michael Hollmann, Series 6, Vol. 6: 1 January 1979-31 December 1980, München: Oldenbourg 2015, pp. 796-800.
[197] Zimmer, Staatsraison, 55-57, 83 and 231f.

towards the Honecker regime, as legal positions now became more strongly emphasised, but the underlying principles remained unchanged.[198] This attitude has been described as 'operational continuity but declaratory change'.[199]

For the SPD, however, securing the *status quo* was not enough – and even in this, the Kohl government was not to be trusted. Enfeebled by the internal dispute over the deployment of nuclear weapons and weakened further by the secession of sections of the party's left to the new Green party, the Social Democrats made a turn to the left in the years after 1982 with regard to their position on matters of Inner-German relations. The party continued to engage in personal exchange with the Honecker government and was often criticised for establishing a *Nebenaußenpolitik,* a separate foreign policy independent from West Germany's government. In doing so, the SPD has been criticised for overemphasising its desire to establish good relations with the Honecker government, rather than seeking close ties with GDR opposition circles. It remains an open question as to what extent this policy may have ideologically stabilised the GDR regime during the 1980s.[200]

Talks between the SPD and SED continued throughout the 1980s and were fuelled by the Social Democrats' concern that the Kohl government could jeopardise the achieved level of relaxation in Inner-German relations. West Germany's SPD and East Germany's SED pursued quite different aims in these talks. The SED strove to gain more respectability in West Germany, and to strengthen those groups in the FRG who were opposed to the new nuclear arms on West German soil. The SPD hoped to make their own position more plausible in East-Berlin, but also wanted to shore up opposition to the GDR regime by

---

[198] Conze, Sicherheit, 619-33; Wolfrum, Demokratie, 382-90; Hacker, Jens: '*Die Haltung von CDU, CSU, FDP und Grünen zur deutschen Frage',* in: Eisenmann, Peter/Harscher, Gerhard (eds.): Dem Zeitgeist geopfert. Die DDR in Wissenschaft, Publizistik und politischer Bildung, München: v. Hase & Koehler 1992, pp. 115-140.

[199] 'operative Kontinuität, aber deklaratorischer Wandel', in: Hacke, Christian: Weltmacht wider Willen. Die Außenpolitik der Bundesrepublik Deutschland, Frankfurt am Main/Berlin: Ullstein 1993, p. 370.

[200] Fischer, Ostpolitik, 381; Conze, 427 and 646-53.

increasing the gap between the government and young reformers as well as by championing a pluralist society.[201]

* * *

Surprisingly, perhaps, given the consensus that fundamental disagreement should not prevent further measures of relaxation, agreed by chancellor Schmidt and Honecker in 1981 (vidi supra), the SPD soon turned to the GDR's demand that the Central Registration Office be closed. Between 1984 and 1989, the continued existence of the *ZESt*, hitherto largely a political matter, became a key contested point of West German *Deutschlandpolitik,* as the country was growing apart along party lines. Freed from any governmental responsibility, the SPD started to advocate the closure of the *ZESt*, and their efforts intensified over time. In 1985, Niedersachsen's Ministerpräsident Gerhard Schröder allegedly promised Erich Honecker that the *ZESt* would be closed,[202] and Berlin's SPD executive committee passed a unanimous resolution declaring the *ZESt* 'ineffective and superfluous'[203] However, since the institution had been established and maintained by all *Länder,* the initiative to close the office also had to come from their governments.

Consequently, Hamburg's governing SPD took on the role of initiating the process. The SPD parliamentary group's motion appealed to Hamburg's state government, the *Senat,* to advocate for the office's closure at the Justice Ministers' conference.[204] Campaigning for this motion, Hans-Jürgen Grambow (SPD) argued that closing the Central Registration Office could be a meaningful step towards

---

[201] Braunthal, Social Democrats, 324.

[202] Neue Osnabrücker Zeitung, 19 December 1985.

[203] 'Antrag des SPD-Landesvorstandes Berlin zur Sicherheits-, Deutschland-, und Berlin-Politik an den SPD-Bundesparteitag am 21. Juni 1986, p. 15, quoted in: CDU Extra 1986, no. 29, 'SPD-Deutschlandpolitik gegen die Interessen der Deutschen', online available at: < https://www.kas.de/c/document_library/get_file?uuid=b0af389e-5294-f6a9-3f28-2fb22f4e4e03&groupId=252038>, last access: 15 September 2019.

[204] Hamburgische Bürgerschaft, Ds. 11/2372, 2 May 1984, online available at: https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGD11-2372.pdf, last access: 15 September 2019.

developing and advancing ‘good-neighbourly relations’ with the GDR. Referring to Honecker’s Gera demands that the *ZESt* should be closed, it would be time for a quid *pro quo* if West Germany expected the GDR to accommodate Western expectations. The Central Registration Office would be seen as an interference with GDR domestic affairs, and would thus hinder adequate relations and a policy of *détente*. Moreover, abolishing Salzgitter would not mean abandoning the claim of punishing abusive and excessive GDR regime acts, as ordinary prosecutor’s offices retained their jurisdiction if West German criminal law could be applied in these cases. He concluded his remarks by branding the Central Registration Office ‘a relic of the Cold War’ that should be dissolved.[205]

Hamburg’s Greens supported the general direction of the motion. Bernd Vetter (GAL) saw the Central Registration Office as 'institutionalised evidence that the Federal Republic’s dominant legal doctrine could never put up with the existence of two sovereign German states.' The assumption that West German laws would also bind East Germans – by using the subjunctive, he indicated that he rejected this notion – entailed that, in case Germany was reunited, thousands of civil servants and functionaries of the GDR would have to be prosecuted. According to Vetter, this violated the prohibition of interference with domestic affairs, as agreed in the *Grundlagenvertrag.* Moreover, in Vetter’s view, this interference also violated basic principles of public international law, and could only be seen as a relic of the Cold War. (However, it needs to be noted that the Federal Government had accompanied the Basic Treaty with a 'Brief zur deutschen Einheit', in which it was declared that the Treaty did not contradict Bonn's aim of achieving German re-unification.[206]) Consciously ignoring the specific situation of German division as opposed to normal international relations between two sovereign states, Vetter

[205] Bürgerschaft der Freien und Hansestadt Hamburg, Plenary Protocol 11/42, 30 May 1984, p. 2447, online available at: <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGP11-42.pdf>, last access: 15 September 2019.
[206] Conze, Sicherheit, 451.

argued that no other state's acts were monitored and recorded by West German prosecutors. The only thing that the Greens regretted about the SPD motion was that it came 'twelve years too late' – thereby referring to the conclusion of the *Grundlagenvertrag* on 21 December 1972.[207]

Only the Christian Democrats opposed this move. Gert Boysen (CDU) pointed to the Brandt federal government's success in excluding the Central Registration Office from the Grundlagenvertrag in the 1970s. He also contended that, if criminal prosecution were not dependent on the Office's existence, abolishing it would not satisfy the GDR government's demand. West Germany's claim that border-related killings and other human rights abuses were punishable under West German law remained the law of the land, *'das zu ändern weder möglich noch politisch vertretbar wäre'*. Thus, dissolving the office would be pointless for the improvement of Inner-German relations. However, it might very well impede criminal prosecution as well as the institution's deterrent effect on GDR officials. Only a fundamental change to the border regime could warrant the abolition of the *ZESt*. The SPD's manoeuvre would only aim at weakening the federal government and at accepting permanent German *Zweistaatlichkeit.*[208] In Public International Law, such declarations made upon or before the signing of treaties is a regular instrument of specifying the signatories' intention and limiting the extent of an treaty.

Eventually, the Social Democrats' motion was passed, but it did not have any direct political effect.[209] However, this debate marks the first public utterance of doubts as to whether the East German government should consider border-related shootings to be punishable acts under West German law, as expressed tentatively

[207] Bürgerschaft der Freien und Hansestadt Hamburg, Plenary Protocol 11/42, 30 May 1984, p. 2449B-D, online available at: <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGP11-42.pdf>, last access: 15 September 2019.
[208] ibid., pp. 2448B-2449B.
[209] ibid., p. 2449D.

by Hans-Jürgen Grambow (SPD) and more forcefully by the Green Party's Bernd Vetter. Previously, despite dogmatic doubts in the legal academy, as expressed in the 1966/67 debate, a political consensus had maintained that the most abhorrent acts of GDR officials undoubtedly qualified for criminal prosecution in West Germany. Now, the legal and political paradigm of the punishability of such GDR acts started to become politicised, albeit rather cautiously. What is more, speakers in this debate also established their respective parties argumentative paradigms regarding the *ZESt*, which received more prominence when the debate escalated between 1987 and 1989.

In 1987, the Social Democrats were supported by the Greens when they had found their way into the *Länder* parliaments. They used parliamentary budget competencies in various *Länder* in order to leverage the *ZESt's* closure by stopping their states' respective financial contributions towards its maintenance. In Hamburg, a parliamentary motion initiated by the SPD in this respect was passed in April 1987, and Hamburg's justice senator subsequently informed his colleague in Niedersachsen that Hamburg would cease its financial contributions in 1988. [210] Similar steps were taken by the governments of Nordrhein-Westfalen, Bremen, and Saarland.[211]

A comprehensive set of arguments for the SPD-led *Länder* actions was given by Rolf Krumsiek (SPD), Justice Minister of Northrhine-Westphalia in his respective

[210] Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 12/286 (SPD motion) and Drs. 12/131 (GAL motion), available at: https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGD12-286.pdf and at: https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGD12-131.pdf, last access: 15 September 2019. See also Bürgerschaft der Freien und Hansestadt Hamburg, Plenary Protocol No. 12/6, 5 February 1987, pp. 316-320A, online available at: <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGP12-6.pdf>, last access: 15 September 2019.

[211] Nordrhein-Westfalen, Bremen, and Saarland all announced their defunding of the *ZESt* in late June or early July 1987, see BArch 141 / 104117, pp. 28-33, 48.

letter. He reiterated most of the arguments already established by Hamburg's SPD in 1984: the continued existence of the *ZESt* was understood as a strain on Inner-German relations. The establishment of the office had been an immediate political reaction to the construction of the Wall. In the light of the policy of détente, and especially after the Basic Treaty of 1972, keeping the office running would no longer be appropriate. Moreover, the criminal prosecution of border-related killings and assaults, which was undoubtedly still necessary according to Krumsiek, could be carried out by the regular judicial branch. According to him, the *ZESt* had not lived up to expectations: only a negligible amount of cases had led to convictions, despite more than 35,000 records being kept at Salzgitter. Krumsiek also added a new argument that became a contested point between supporters and opposers of the *ZESt*. He called into question one of the fundamentally political arguments in favour of the office, the idea of deterrence. Rather than deterring border guards from firing at fugitives, Krumsiek argued that it might reinforce their loyalty to the GDR regime, since they would have to fear criminal prosecution in the West in case of desertion to the Federal Republic.[212] Finally, Krumsiek pointed to remarks made in previous years by leading liberal-conservative politicians. Statements such as the FDP chairman's that the *ZESt* was a 'Cold War relic' were seen as having undermined the *ZESt* already..[213] Rheinland-Pfalz's Minister President Bernhard Vogel and Ottfried Hennig, parliamentary state-secretary (deputy Federal Minister) for Inner-German relations, had mentioned that the *ZESt* could be dissolved at some point. Vogel had said its existence would be 'no iron law'. Likewise, Hennig had argued that the office could be dissolved – but only if the GDR lifted the *Schießbefehl.*[214] In light of these remarks, Krumsiek saw the value of Salzgitter as leverage in negotiations with East-Berlin as being compromised.

[212] Letter from Nordrhein-Westfalen's Minister of Justice to Niedersachsen's Minister of Justice, in: BArch B 141 / 104117, pp. 29-33.
[213] Letter from Nordrhein-Westfalen's Minister of Justice to Niedersachsen's Minister of Justice, 27 July 1987, in: BArch B 141 / 104117, pp. 29-33.
[214] For all quotations, see ibid.

Krumsiek's letter is representative of the sentiments and aims quoted by all opponents of the continued work of the office at Salzgitter. They aimed to improve Inner-German relations by meeting the Gera demands. Their arguments towards this end were based predominantly on diplomatic, political, and pragmatic considerations related to the contemporary state of German division. Considerations of the future – that is, what role the institution and the files kept by it could play during a possible future reunification process – were all but absent from this debate. So was the judicial legitimacy of its work: the unresolved questions of legal dogma and legal philosophy which had concerned the work of Salzgitter since the beginning.

The Social Democrats' cause was furthered by the city council of Salzgitter, which, on 26 August 1987, approved a resolution expressing regret that the office had not been closed yet. In light of Erich Honecker's state visit to Bonn in 1987, the city council hoped that the Central Registration Office could be closed, as they sought to be twinned with an East German city in order to promote Inner-German *Entspannung.*

In response to these demands, conservatives sought to close ranks. The issue was taken seriously, otherwise Salzgitter's city council's resolution would not have been presented to the Chief of the Federal Chancellery, Wolfgang Schäuble.[215] However, conservative *Länder* Justice Ministers struggled to find compelling arguments in defence of the *ZESt*.

An institutional argument was made in claiming that only the *ZESt* would be able to keep record and track all 'violent acts and *Unrechtsurteile'.* The institution's work was a necessary precondition for criminal prosecution, and this threat remained necessary as long as Germans shot Germans, as West-Berlin's justice

[215] Letter from the Mayor of Salzgitter to the Federal Chancellor, 14 September 1987, in: BArch B 141 / 104116, p. 101.

senator Rupert Scholz (CDU) claimed in his reply.[216] Moreover, the idea of a deterrent effect was upheld, as Bayern's Justice Minister Mathilde Berghofer-Weichner (CSU) added in her reply. Liquidating the office would render this deterrent ineffective and would be seen as backing off in the face of human rights abuses in East Germany. If the *Länder* dissolved the Central Registration Office, they would fail to live up to their responsibility for the 'human rights of all Germans in divided Germany'. She ended with scathing criticism of the Social Democrats: Human rights abuses, she wrote, had to be denounced. But it would be 'implausible' to 'play the champion of human rights in other parts of the world, but to keep quiet about crimes which are happening in one own's backyard.'[217] But these arguments were either hypothetical – in the case of criminal prosecution, since it happened very rarely – or speculative, as it was impossible to measure the deterrent effect of the threat of criminal prosecution on GDR officials. Overall, these arguments were not particularly compelling. Hence, an attempt was also made to block any unilateral defunding by doubting that the *Länder* had the competence to do so. Rather, the biannual conference of Ministers of Justice should debate the issue, as proposed by the Ministers from Niedersachsen, West-Berlin, Hessen, Baden-Württemberg and Rheinland-Pfalz.[218] This idea, however, was rejected by the SPD Ministers in Hamburg and Nordrhein-Westfalen.[219]

The issue remained a politicised topic throughout autumn 1987. A conference of the chairmen of all CDU/CSU parliamentary groups on federal and *Länder* level approved a motion by West-Berlin's CDU caucus, expressing their resolution to

[216] Letter from West-Berlin's Justice Senator to Nordrhein-Westfalen's Justice Minister, 20 August 1987, in: BArch B 141 / 104117, pp. 10f.
[217] Letter from Bayern's Justice Minister to other Justice Ministers, 20 November 1987, in: BArch B 141 / 104117, pp. 19-22.
[218] For the letter from Niedersachsen's Justice Minister, see BArch B 141 / 104117, pp. 12-15; For Westberlin (15 September 1987), see ibid., pp. 80-82; For Hessen (18 September 1987), see ibid., pp. 92-94; For Baden-Württemberg (5 October 1987), see ibid., p. 105; For Rheinland-Pfalz (2 October 1987), see ibid., pp. 103f.
[219] Letter from Hamburg's Justice Senator (6 October 1987), in: BArch B 141 / 106117, pp. 40-42; For Nordrhein-Westfalen (26 November 1987), see BArch B 141 / 104117, pp.44-47.

maintain the Central Registration Office in the future. In case future negotiations with Bremen, Hamburg, NRW and Saarland remained unsuccessful, the CDU and CSU-led governments were asked to increase their funding for the office to continue its service. The conservatives used this opportunity for some virtue-signalling statements. The Central Registration Office stood for the claim 'to prevent injustice falling into oblivion'.[220]Demanding human rights for 'Germany's other half could only be credible, if information on the extent of such violations could be obtained and recorded:

> 'The situation on the wall and barbed wire is by no means made more bearable by wanting not to know; not knowing does not undo injustice. Rather, the causes of injustice must be fought, its henchmen denounced, its extent documented and moral pressure exerted on the authorities in the GDR by constant demands for the fulfilment of human rights.'[221]

In these words, the CDU made a strong case for the Office, based solely on contemporary grounds. Its arguments had a *deutschlandpolitisch* grounding; they were words of diplomacy. Questions of how desirable it would be to use the criminal law after potential future German reunifications were not considered. As often in debates about GDR acts, future ramifications of the paradigm of punishability and the work of the Central Registration Office were not contemplated.

The conservative-liberal *Länder* governments knew that it would be difficult to force the SPD-led *Länder* to continue their financial contributions. This was also supported by a memorandum from the Federal Justice Ministry in December 1987, noting that the purely administrative agreement that provided the legal basis of the

[220] 'Unrecht nicht der Vergessenheit anheim fallen zu lassen.', in: 'Beschluss der CDU/CSU-Fraktionsvorsitzendenkonferenz vom 23.-25. Oktober 1987', BArch B 141 / 104116, pp. 114-116.
[221] 'Die Situation an Mauer und Stacheldraht wird keinesfalls durch Nicht-Wissen-Wollen erträglicher; das Nicht-zur-Kenntnis-Nehmen macht Unrecht nicht ungeschehen. Es müssen vielmehr die Ursachen des Unrechts bekämpft, seine Handlanger angeprangert, sein Ausmaß dokumentiert und durch beständige Forderung nach Erfüllung der Menschenrechte in der DDR ein moralischer Druck auf die dortigen Behörden ausgeübt werden.', in: ibid.

ZESt was unable to oblige all *Länder* permanently and even against their will to fund the office. A majority vote of the Justice Ministers' Conference to maintain the office was not qualified to overrule parliamentary decisions of individual *Länder.*[222] However, the remaining governments and the federal government were also unwilling to give in to the Social Democrats' move.

At the Justice Ministers' Conference on 17 December 1987 in Bonn, the parties were unable to reach a consensus. The statement of the four *Länder* which had terminated their financial contributions was acknowledged. However, it was concluded that the Central Registration Office continued to exist on the basis of the conference's resolution of October 1961.[223] To fill the budgetary hole of approx. DM 66,000 p.a., the federal ministries of justice and inner-German relations agreed to double the federal subsidy from DM 50,000 to DM 100,000.[224]

This virtual cease-fire did not endure for long. In the wake of the *Baschel* affair in 1987, the SPD took over the government in May 1988 with an absolute majority. Subsequently, Schleswig-Holstein joined the other SPD-governed *Länder* and terminated its financial contributions to the *ZESt* in December 1988.[225] The same arguments were used to justify this move, and only Bayern's Justice Minister saw fit to reply, albeit in a business-like manner. [226] Answering an ensuing parliamentary query in the Bundestag, parliamentary state secretary Friedrich-

[222] Memo of the Federal Ministry of Justice, 8 December 1987, BArch B 141 / 104117, p. 23-26.
[223] 'Auszug aus der Niederschrift des Ergebnisprotokolls der Jahresabschlusskonferenz der Justizminister und -senatoren am 17. Dezember 1987 in Bonn', BArch B 141 / 104117, pp. 49-50.
[224] Memo of the Federal Ministry of Justice, February 1988, BArch B 141 / 104117, pp. 53-56.
[225] Letter from Schleswig-Holstein's Minister of Justice to Nordrhein-Westfalen's Minister of Justice, 2 December 1988, BArch B 141/104117, pp. 72-75.
[226] Letter from Bayern's Minister of Justice to Schleswig-Holstein's Minister of Justice, 30 December 1988, BArch B 141 / 104117, pp. 76f.

Adolf Jahn (CDU) only made the half-hearted claim that evidence suggested the *ZESt*'s existence was 'not without mitigating effect'.[227]

Only weeks later, in January 1989, West-Berlin's voters shocked both pollsters and politicians when they surprisingly gave the CDU and SPD equally high election results in West-Berlin's state parliament election. After difficult negotiations, SPD-politician Walter Momper entered a formal coalition with the *Alternative Liste* (AL; later: *Die Grünen*), and the city government (*Senat)* was sworn in on 16 March 1989. The CDU had been ousted after almost nine years. In a resolution on the new government's guidelines, the new Senate held that close relationships with the GDR should be established. Berlin's future was envisaged in a European *Friedensordnung* which would overcome Europe's division into political blocks. For the time being, it would be decisive that both German states mutually accepted their existence and would seek as much cooperation as possible. Thus, breaking with all *deutschlandpolitisch* orthodoxy, but quite in line with the SPD's *Nebenaußenpolitik* since 1982, the *Senat* expressed their resolution:

> 'In diesem Sinne kommt es nicht darauf an, Grenzen in Europa zu verändern, sondern den bestehenden Grenzen ihren trennenden Charakter zu nehmen. Dies gilt auch für die deutsch/deutsche Grenze und die Mauer in Berlin.'[228]

A seemingly anachronistic authority like the Central Registration Office – an institutional materialisation of West Germany's claim to sole representation of the German nation (*Alleinvertretungsanspruch)* – did not fit into this new picture. Hence, defunding the Central Registration Office became one of the first policy measures which the new government pursued. On 23 May 1989, notably on the day of the 40th anniversary of the Federal Republic's foundation, West-Berlin's senate voted to seek a swift abolition of the Central Registration Office and to stop West-Berlin's financial contributions of DM 8,343 p.a. from 1990 onwards.[229] The

[227] 'Anfrage' (Parliamentary Question), Wolfgang Börnsen, MdB, 19 January 1989, BBArch B 141 / 104117, p. 60; The written reply from the Federal Ministry of Justice (26 January 1989, ibid., pp. 70f.

[228] 'Senatsbeschluß No. 38/89 vom 4. April 1989', LAB, B Rep 002,.

[229] 'Senatsbeschluß No. 132/89 vom 23. Mai 1989' (G Sen 1 – 1240 – 132/89), LAB, B Rep 002.

enclosed press release reiterated the arguments put forward by all other *Länder* which had terminated their contributions: the low figure of judgements was alleged to prove the institution's ineffectiveness, and criminal prosecution remained possible through the work of ordinary state prosecutors. However, two new arguments surfaced, as the *Senat* expressed doubt as to the legality of criminal trials – as well as pointing to the fact that the acts in question might have lapsed by now anyway.[230]

A debate at the Justice Ministers' Conference from 30 May to 1 June had failed to deliver Jutta Limbach's (SPD) [231], West-Berlin's Justice Senator) preferred outcome of closing the office. Subsequently, she informed her colleagues about the state's decision to terminate all funding contributions.[232] West-Berlin's specific situation at the heart of German division prompted the Federal Government to respond more forcefully than previously. Recent incidents such as Chris Gueffroy's death in early 1989, it was claimed, proved the Federal Government's views right.[233] Most other Justice Ministers, however, deemed no reply necessary, possibly bored or worn out after the cascade of terminations by SPD governments. Only Bayern's Justice Minister replied, repeating her previous assertions, and adding that West-Berlin's special situation would have demanded a different way of action.[234] As a consequence, Berlin's chapter of CDU's youth organisation, *Junge Union Berlin*, announced that it would engage in public fundraising to balance the budgetary hole after West-Berlin's termination of funding.[235] When West-Berlin's budget proposal without any financial contribution to the *ZESt* was approved by West-Berlin's *Abgeordnetenhaus,* this went through without any

[230] ibid.

[231] Limbach later became President of the Federal Constitutional Court when it ruled on the constitutionality of the border guard cases, see chapter III.

[232] Letter from West-Berlin's Justice Senator to the Federal Minister of Justice, 10 May 1989, and Letter from West-Berlin's Justice Senator to Niedersachsen's Justice Minister, 3 June 1989, BArch B 141 / 104117, p. 81-87.

[233] Memo of the Federal Ministry of Justice, 23 May 1989, ibid., pp. 79f.

[234] Letter from Bayern's Minister of Justice, 26 July 1988, ibid., pp. 88f.

[235] Press report, B 141 / 104117, unpaginated.

controversial debate – notably after the fall of the Berlin wall – on 8 December 1989.[236]

Reviewing this continuous and repetitive debate about the Central Registration Office and everything it stood for during the 1980s, it is striking how presentist arguments were. That is, they were based on diplomatic considerations and the Gera demands of the GDR government. Serious thoughts of future German unity were largely absent from these considerations. Whether the criminal law was a desirable and feasible means of addressing socialist state crime was not considered. This quiet adaptation to the *status quo* reflected a wider development in Inner-German relations, namely that West Germany had accustomed itself to a more permanent state of German division.[237] Hence, judicial categories such as criminal law and punishability were no longer perceived as a predominantly legal issue, but a political-diplomatic one, as well as a matter of domestic virtue-signalling.

What changed, however, was that questions of punishability and the criminal law were separated from institutional questions around the Central Registration Office. Increasingly, Social Democrats started to suggest and later demand the closure of the Central Registration Office, thus accepting Erich Honecker's demand. But at the same time, the paradigm of punishability of the aforementioned GDR acts was hardly ever openly questioned or denied. Rather, it was suggested that ordinary state prosecutors could fulfil the role of the Central Registration Office instead. Not the claim of punishability, but the Central Registration Office as its most prominent expression and reiteration had come under attack. The idea of punishability itself, in contrast, did not seem very relevant or drastic: no one

[236] Berliner Abgeordnetenhaus, Drs. 11/270, 22 August 1989, online available at < https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/EED11-270.pdf>, last access: 15 September 2019.

237 Wirsching, Andreas: Abschied vom Provisorium, 1982-1990 (=Geschichte der Bundesrepublik Deutschland, vol. 6), München 2006. p. 599

expected it to attain any actual relevance. No one believed in German reunification; least of all the Social Democrats.

* * *

The notion that GDR government were a case for West German trials was established in an office in Salzgitter and a courtroom in Stuttgart in the early 1960s. As for the *ZESt*, its foundation in autumn 1961 was an immediate, almost impulsive reaction of West German politicians, and it was met with consensus from liberals, social democrats, and conservatives. Arguably, the office was a permanent institutional expression of West Germany's claim that German division was wrong, and that enforcing the border regime at the price of killing fugitives was repulsive. In 1963, this notion was reinforced by *Landgericht* Stuttgart in the Hanke case, where the court offered a multilayer justification for why prosecuting Hanke was legal. These justifications, however, became – convincingly perhaps – contested in the legal sphere. In the late 1960s, this challenge spilled over into federal and *Länder* ministries, and administrators as well as politicians realised that the grounds for criminal prosecution of GDR officials were weaker than previously assumed. While this had some procedural consequences for the Central Registration Office, the paradigm of punishability of GDR crimes and the work of the *ZESt* was almost unanimously supported by politicians up until 1982.

Diplomatic interventions by the GDR, the marginal figures of convictions of GDR officials, and liberation from government responsibility led Social Democrats to reconsider their commitment to the work of the *ZESt* from 1984 onwards. Publicly, at least, only the office, and not the notion of punishability, was called into question – but in reality, the notion itself had very little relevance. After all, no one saw many GDR officials coming under the jurisdiction of West German courts. As for the conservatives, they held on to the office as a diplomatic tool and as leverage in negotiations with East-Berlin, but their defence of the office grew less and less passionate. Maintaining it cost little, both financially as well as politically, and it was in line with the Kohl government's double-track *Deutschlandpolitik* of

securing cooperation and seeking relaxation where possible while insisting on legal (or legalistic) views regarding the German question. In reality, and despite the rhetoric of the government, Kohl and Genscher had accommodated themselves to a long-lasting German division. Yet, after the fall of the Wall, their public insistence on legal positions and the prospect of German unity allowed for widespread interpretations of Kohl as a far-sighted statesman possessing qualities of forceful leadership. At the same time, the SPD's *Nebenaußenpolitik* and Oscar Lafontaine's reluctance towards German reunification undermined the credibility of Social Democrats in both East and West.[238] This not only led to weak performances in the first free elections, but also legitimised conservative concepts of the German question and proposals for the design of German reunification. Perhaps Social Democratic voices could have had important things to say about the design of East Germany's comprehensive transformations, but they scarcely found an audience that was willing to listen.

Naturally, no one saw the fall of the Berlin Wall coming. But when it happened, the Central Registration Office, which gained attention only from the SPD's continuously unsuccessful quest to dissolve it, became unexpectedly relevant. Fritz Schäffer's remark of 1961 became surprisingly meaningful: the deeds recorded in the 40,000 files by the *ZESt* were so severe that West Germany's criminal code demanded criminal prosecution *ex officio.* Once the GDR acceded to the Federal Republic, state prosecutors became obliged to initiate preliminary proceedings to avoid charges of perversion of justice. It remains unclear to what extent this was understood by politicians before German reunification happened in October 1990.

During the bloc confrontation, the Central Registration Office had served ideological and diplomatic – in any case: pragmatic, not legal – purposes. In the eyes of its supporters, it deterred GDR officials from committing repulsive and

[238] Conze, Sicherheit, 689-746.

morally wrong acts, served as a moral demarcation, and was a means for the restoration of a sense of justice for East Germans. Now, within days, the products of its work, those 40,000 investigations files, became a powerful force that enabled, if not pushed, the authorities of a freshly re-united Germany to use this existing material in the newly-opened field of bringing socialist perpetrators to justice.

After the end of the fall of the Wall and the end of the SED regime, the work of Salzgitter became more important. Over the years, its sheer existence had anticipated questions which became more pressing now: what should be done with huge quantities of GDR officials after the state's demise? In the past, the ZESt's work and existence had been shaped by pragmatism, but also by ideology. Now, however, its investigation files became subject to a legal obligation on state prosecutors to initiate proceedings – unless politicians would agree on a different path of transitional justice.

2. Seeking Justice, Enabling Reconciliation: Public Debate and Political Decision-Making, 1989/92-1997

This chapter aims to explore political debates and legislative decision-making in the realm of criminal prosecution as a measure of transitional justice in the early 1990s. In political debates, politicians wrestled with the usual challenges of transitional processes: striking a fair balance between seeking moral and indeed legal justice on one hand, and on the other enabling reconciliation between former antagonists and ensuring the success of the transition by preventing former elites and organisations from gaining momentum towards a reactionary agenda.

Naturally, we need to bear in mind that those challenges faced by every transition were still a little different in East Germany compared to other post-socialist Eastern European countries: unlike, say, Poland or Hungary, the GDR ceased to exist. It was absorbed by the Federal Republic which could facilitate the transitional process with unmatched economic, institutional and human resources. Especially once reunification had been achieved, there was no ostensible danger that a strong reactionary backlash could endanger the revolution's progress and success: even an implausibly like-minded socialist population in the *Neue Länder* would still have been outnumbered by West Germany's population and their vote share. Likewise, political leaders had to pay little attention to accommodating old elites and functionaries, as the transitional process and institutions like the judiciary, state governments, civil service or the economy were – potentially – still able to rely on incoming staff resources from the *alte Länder,* the former West. And lastly, the country could rely on uncompromised legal resources, as West Germany's criminal

law had now been adopted in the former East as well. After all, German reunification was not a merger of two parts on an equal footing, but East Germany's accession to, and absorption into, the institutions and discourses of West Germany.[239]

When asking how political actors tried to balance seeking justice and enabling reconciliation, we explore and illustrate conflicting concepts of *Aufarbeitung* or *Vergangenheitspolitik.* This chapter also aims to identify relevant political actors, i.e. major proponents of a policy of criminal prosecution vis-a-vis advocates of an amnesty-based approach. Moreover, it analyses legislative steps which enabled, safeguarded and politically legitimised criminal trials against former GDR officials through the extension of limitation periods in 1993. Hence, this chapter looks at how political decisions were taken by which political actors and how they were vindicated in a multifaceted political field.

While all parties, save the PDS, recognised the need for extending limitation periods, political interest and ideological sensitivities modulated the responses in parliamentary debates. Divisive points were, among others: which offences should be covered; how directly to apply precedent from the debates during the 1960s and 1970s about the extension of limitation periods with respect to Nazi crimes; and whether to reflect the complicity of Block parties and even the general population in the 'rule of unlawfulness' (*Unrechtsstaat*). On a more general level, politicians and legal commentators clashed on whether the GDR was at all to be equated with the Third Reich. All this can be seen in exceptional clarity in the debates and parliamentary drafting and redrafting of bills relating to extending the limitation periods in 1992 and 1993. They are, hence, the topic of this chapter.

[239] For a most recent and critical view of that 'takeover', see Kowalczuk, Ilko-Sascha: Die Übernahme. Wie Ostdeutschland Teil der Bundesrepublik wurde, München: C.H. Beck 2019; cf. also Rödder, Andreas: Deutschland einig Vaterland. Die Geschichte der Wiedervereinigung, München: C.H.Beck 2009, pp. 370-72.

As this study argues, the Border Guard Trials were not a carefully considered expression of a unified and consistent philosophico-political position. Rather, they came to pass ad-hoc and to an extent determined and constrained by legal, ideological and historical framings (see introduction, chapters 1 and 3). Public interventions by former GDR civil rights activists such as Friedrich Schorlemmer, Wolfgang Thierse, and Wolfgang Ullmann, who spoke out in favour of a 'people's tribunal', were quickly dismissed and could gain little political traction. They were, however, the decisive impulse for the establishment of the Enquete-Kommissionen.[240] In the absence of a genuinely political initiative for criminal trials, parliamentary debates about the extension of limitation periods have served as a retroactive political and parliamentary legitimisation and confirmation of those ongoing trials. In other words: these legislative processes served as a symbolic and surrogate political debate on the paradigm of using the criminal law as a transitional justice measure. Those legislative acts of 1993 were pushed for by right-of-centre forces, so-called '*bürgerliche Kräfte'*, that is conservatives (CDU/CSU) and liberals (F.D.P.) as well as East-German civil rights activists among Social Democrats (SPD) and Greens (Bündnis ’90/Die Grünen). However, these two left-leaning parties were more strongly divided on the right course of transitional justice with respect to former GDR officials. Yet, I argue that, given the East German judicial initiatives explored below (Ch. III) and the strong advocacy for continued criminal prosecution as uttered by former East German civil rights activists across party lines, debates and legislation on criminal proceedings against former GDR officials (i.e. the extension of limitation periods to ensure ongoing criminal prosecution) were not (only) an expression of political dominance of West German politicians and normative concepts, but rather were initiated and substantially vindicated by East German politicians.

[240] Weinke, Annette: Gewalt, Geschichte, Gerechtigkeit. Transnationale Debatten über deutsche Staatsverbrechen im 20. Jahrhundert, Göttingen: Wallstein 2016, pp. 275-82; Mouralis, epuration, 142-50.

The Challenge of Limitation Periods, 1992-93

Given the manifold challenges that societies face after comprehensive political transformation, it is, perhaps, not all that surprising that *vergangenheitspolitische* debates were only held if they could no longer be suppressed or delayed.[241] In other words: such debates never emerged without a concrete cause. This is certainly true for re-united Germany's approach towards open questions regarding state crime during the GDR. For re-united Germany's attempt to 'come to terms' with East Germany's socialist past, this specific cause was uncertainty as to whether criminal prosecution of government crimes was legally possible. The legal concept of punishability of GDR government acts had been established well enough in previous decades (see chapter I) and had been reinforced by legal actions taken by East Germany's judiciary even before the GDR saw its end (see chapter III). But now, in the early 1990s, a legal technicality challenged the whole construction: the lapse of time.

According to legal scholars, limitation periods have a high social value. They aim at securing legal peace after a significant amount of time has lapsed. [242] According to § 78 of Germany's criminal code, minor crimes lapse after three years (sentence: up to one year in prison or penalty), medium-heavy offences (sentence: one to five years in prison) lapse after five years.

Now, in view of East Germany's political transition, what was called *minderschwer* (minor) or *mittelschwer* (medium-heavy), was not so negligible as one might like to think. Minor offences include the violation of privacy of correspondence – a constitutional right in Art. 10 GG after all – , spying or trespass. All were deeds which were essential for the running of the GDR's notorious secret service Stasi and which not only violated citizens' rights, but also, at times, gravely

[241] Frei, Nazi Past, 7-24.

[242] Strätz, Hans-Wolfgang: *'Verjährung',* in: Staatslexikon der Görres-Gesellschaft, Vol. 5, 7th edition, Freiburg/Basel/Wien: Herder 1989, 671-74.

impaired their private and professional life and which contributed to the very *Unrechtsnatur* of the GDR. More so, medium-heavy crimes, whose lapse did not immediately loom, include fraud, perversion of justice, assault and battery or false imprisonment. Again, acts that constituted the very *Abhörstaat* or, in the case of fraud, contributed to the rightfully perceived idea of a corrupt elite that authorised all sorts of luxuries for themselves while appealing to 'the people' to tighten their belt. Hence, it is quite evident that allowing for these deeds to lapse would not have meant merely disregarding minor, irrelevant crimes, but allowing acts which stabilised and indeed constituted the dicatorship's deep penetration of society to be brushed under the carpet, or, in any case, prevent the victims from bringing their tormentors to justice. The question of limitation periods of these crimes, small as they may have seemed according to the taxonomy of Germany's criminal law, was therefore a grave and very political one, exceeding mere persecutory fury.

Naturally, a significant share of the supposedly criminal deeds in question had been committed a significant time ago when reunification happened, so that normally, they would have lapsed long ago, certainly before German reunification and before West German courts and prosecutors could even begin to contemplate effective prosecution. And so, the lapse of time and limitation periods became the cause for widespread political and judicial debate. As will be demonstrated below, this debate was inextricably intertwined with political, legal, and moral debates about West Germany's efforts of a judicial reckoning with former Nazi perpetrators which had taken place since the 1960s.

* * *

We know little other than the given name of the child: Svetlana. Apart from that, we neither know her surname nor her age, let alone anything of her family. What we do know, however, is that her life changed in a court room in Staßfurt. The city, roughly thirty-five kilometres south of Magdeburg, is known predominantly for the world's first potash mine. Here, on 10 August 1973, a district court decided to take Svetlana away from her parents and to let another couple adopt her instead. The

GDR's family law knew this as *'Annahme an Kindes Statt'*. Today, it is known that this measure was not only used to protect children from abusive parents or neglect, but also to punish oppositional citizens and other dissenters by taking away their children and to reward political loyalty of couples who failed to have children of their own. Edwin, whose surname is unknown to us, was one of the judges who decided this case. In 1991, almost a year after German reunification, Magdeburg's state prosecutor (*Staatsanwaltschaft*) decided to charge Edwin for abuse of justice in this case of 1973, that is, eighteen years earlier. However, the competent district court dismissed the case on grounds of lapse of time in April 1992.[243]

In 1991 and 1992, at least two more verdicts gave rise to concerns that – despite all institutional preparation and comprehensive records of many cases – a significant number of government crimes of the GDR could no longer be prosecuted as they might have lapsed even before German reunification. [244] The aforementioned case of Edwin prompted the ministry of justice of Sachsen-Anhalt to send a letter to the Federal Ministry of Justice and Bundestag's legal committee's chairman, demanding a legislative clarification of the matter.

It also became clear that the regulations of the German Reunification Treaty (*Einheitsvertrag,* GRT) were insufficient. Here, article 315a had been added to the *Einführungsgesetz zum Strafgesetzbuch,* a bill that had reformed the penal code in 1975. The GRT had stated that the lapse of such crimes punishable under GDR law which had not yet lapsed was 'interrupted' by German unity, effectively meaning that the lapse of time would begin to count anew. This gave prosecutors time to sort things out regarding recent crimes. But less recent crimes remained untouched.

So, shortly after German reunification, both the legal system and politicians faced uncertainty as to whether and how criminal prosecution of GDR officials for abusive acts was possible at this point in time – and whether it remained feasible

[243] PA-DBT 4000 XII/187, lfd. No. 38.
[244] ibid.

beyond a very short time horizon. More precisely, it was unclear whether criminal acts from long ago were still punishable, despite the regulations of the GRT, and whether more recent crimes which had not lapsed yet would, inevitably, lapse within a few years.

Against this backdrop, state governments – which play a significant role in German law-making in their role as members of the second chamber (Bundesrat) – felt a strong urge to act. And so, in early 1992, state governments from Bayern, Thüringen and Mecklenburg-Vorpommern, tabled to draft bills which aimed at providing legal certainty and predictability for courts and at appearing capable of acting with respect to Germany's quest to 'work through' Socialism.

The first draft bill was submitted by the state governments of Bayern, Thüringen and Mecklenburg-Vorpommern, all led by conservative politicians of CDU or CSU. This draft bill intended to declare that the usual lapse of time had been ineffective for political crimes in the GDR between 11 October 1949 (two days after the GDR had been founded, when Wilhelm Pieck became first President) and 17 March 1990 (the last day before East Germany's first and only democratic parliament had been elected). More precisely, the draft bill envisaged this *Ruhen der Verjährung* for such crimes which 'have not been prosecuted in accordance with the express or presumed will of the leadership of the former GDR for political reasons or reasons incompatible with fundamental principles of a liberal constitutional order'.[245] The draft bill claimed that if legislators failed to clarify these questions, years could pass by until a high court verdict could decide the matter. It was expressly feared that the aforementioned verdicts could have 'a grave impact' on trust in the legal system

[245] '…entsprechend dem ausdrücklichen oder mutmaßlichen Willen der Staats- und Parteiführung der ehemaligen DDR aus politischen oder sonst mit wesentlichen Grundsätzen einer freiheitlichen rechtsstaatlichen Ordnung unvereinbaren Gründen nicht geahndet worden sind.' in: 'Entwurf eines Gesetzes zur Verjährung von SED-Unrechtstaten (VerjährungsG) vom 28.02.1992', BR-Drs. 141/92, 28 Feb 1992, PA-DBT 4000 XII/187, lfd. No. 1.

among East Germans, just as it was growing.[246] Only a few days later, Mecklenburg-Vorpommern's state government separately took a step further and submitted a more far-reaching draft bill. According to this, minor crimes should have been expired no earlier than on 2 October 1996, i.e. at least three years after the original date; medium-heavy crimes no earlier than on 2 October 2000, i.e. at least four years later.[247] In hindsight, the necessity and urgency for this more sweeping proposal is clear: without the extension of limitation periods, 3 October 1993 would have been the day of expiration for many GDR government crimes, at least if one assumes that the first draft bill (1. Verjährungsgesetz[248]) would be accepted.

Bundesrat initiatives for the Limitation Period Bills

The legislative proceedings on what became known as the first and second Limitation Period Acts (1. and 2. *Verjährungsgesetz*) were opened on 13 March 1992 in Bundesrat. Thüringen's Justice Minister Hans-Joachim Jentsch (CDU) argued, that the Germans owed the judicial 'Bewältigung des SED-Unrechts' to themselves,[249] rejecting any notion of victor's justice. Prosecution would be based on those regulations of GDR law, which '(…)the rulers then autocratically overruled when it came to criminal acts to their advantage'.[250]

Rainer Funke (FDP), Parliamentary State Secretary in the Federal Ministry of Justice, had the privilege of outlining the government's view on an issue where hitherto, the cabinet had remained rather inactive. Like all other speakers, the federal government emphasised the importance of criminal justice in the process of

[246] '…schweriegende Auswirkungen auf das sich derzeit entwickelnde Vertrauen der Bevölkerung der neuen Länder in die Justiz.', in: ibid.
[247] PA-DBT 4000 XII/245 Bd. A lfd. 1.
[248] Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten (VerjährungsG) vom 26. März 1993, Bgbl. 1993 I p. 392.
[249] PA-DBT 4000 XII/245 Bd. A lfd. No. 2, p. 104-05.
[250] '… die Machthaber dann selbstherrlich außer Kraft setzten, wenn es um kriminelles Handeln zu ihrem Vorteil ging.', ibid.

'mastering' the GDR past. Funke identified a 'longing for the rule of law'[251] as a driving force for the GDR's peaceful revolution of 1989. Therefore, it was crucial for this hope not to be dashed and for the country's 'legal peace'[252] not to be compromised by judicial idleness.[253] The GDR's victims deserved that 'legitimate punitive claims'[254] would be asserted. This meant neither revenge nor retribution, but the realisation and assertion of the '*Rechtsstaat'*.[255] In saying so, Funke relied on the popular rhetorical figure of contrasting the *Rechtsstaat* of the Federal Republic with the '*Unrechtsstaat'* that the GDR allegedly had been*;* this concept had left its stamp on decades of West German self-image and should remain a central rhetorical concept throughout the 1990s.[256]

Of course, the problem of justifying exceptional treatment of GDR government crimes in terms of limitation periods persisted, but Funke relied on the far from unusual comparison of GDR and Nazi Germany. The 'Third Reich' had acknowledged the Führer's will as factual law; the GDR had acknowledged the will of the regime as factual law. Therefore, all precedent established where extraordinary limitation periods and regulations were concerned, as had been developed in the disputes over the prosecution of Nazi perpetrators, could be easily transferred to cases of GDR state crime.[257].

In a nutshell, the federal government showed sympathy for the request to extend limitation periods, but pushed for 'further deliberation' – delaying as a tactic of

---

[251] 'Sehnsucht nach Rechtsstaat'

[252] 'Rechtsfrieden'

[253] PA-DBT 4000 XII/245 Bd. A lfd. No. 2, p. 110-11.

[254] 'legitime Strafansprüche'

[255] ibid.

[256] Wilke, Christiane: '*Östlich des Rechtsstaats. Vergangenheitspolitik, Recht und Identitätsbildung'*, in: Matthäus, Sandra/Kubik, Daniel (eds.): Der Osten. Neue sozialwissenschaftliche Perspektiven auf einen komplexen Gegenstand jenseits von Verurteilung und Verklärung, Wiesbaden, Springer VS 2016, pp.169-194.

[257] PA-DBT 4000 XII/245 Bd. A lfd. No. 2, 110-11.

inaction, as viewers of Britain's popular sitcom 'Yes, Minister' might be inclined to think.

Only Jürgen Trittin (Bündnis '90/Die Grünen), Minister for Federal and European Affairs in Niedersachsen, roughed up the otherwise businesslike and calm debate, a usual quality of Bundesrat deliberations. Though superficially acknowledging the necessity of criminal prosecution of GDR government crimes, he exercised himself in fundamental critique and quibbling deliberations. Referring to the title of the second draft bill, he rejected the term 'SED-Unrecht', as also such government crimes would be included which had not been committed by formal party members of the SED. He claimed that the long-standing GDR Justice Ministers Kurt Wünsche and Hans-Joachim Heusinger (both LDPD, a 'liberal' block party that lived in forced cooperation with the SED) had been complicit in covering-up cases of state crime. Indeed, those two politicians had held the office between themselves from 1967 until 1990. Describing GDR government crimes as 'SED-Unrecht' would in fact exonerate those 'block parties' from their responsibility and complicity. Likewise, their integration into West Germany's conservative and liberal parties, as had happened after reunification, would be concealed by this rhetorical dodge.

Trittin's *tu quoque* argument to deflect attention away from the question at hand was rather obvious and surprisingly in line with strategies of *Whataboutism,* which the USSR had deployed for decades: Trittin's remarks reflected the continued rejection of criminal prosecution as a measure of *Aufarbeitung,* which had been characteristic for Green initiatives regarding the *ZESt* all the way since the 1980s.[258]

But Trittin also emerged with more impressive views. He discussed the fundamental importance of acceptance – or tolerance – of a dictatorship by its citizens. The GDR could not have survived, he believed, without the 'toleration of

[258] For the following quotes: PA-DBT 4000 XII/245 Bd. A lfd. No. 2, p. 107-08.

many, without followers and without countless accomplices', be they driven by need or opportunity.[259] This was, of course, correct – but it remained unclear which policy of transitional policy was to follow from this insight. In any case, Trittin rejected any equalisation of GDR and the Nazi dictatorship: 'Isn't it perhaps also possible (…) to name injustice in the GDR without using this analogy and at the same time questioning the singularity of the industrially organised genocide of the National Socialists?'[260] This was meant as a reaction to statements of conservative and liberal politicians, who time and again blurred the lines between *comparing* NS and GDR and *equating* them. For example, the parliamentary secretary of state, Rainer Funke, had merely pointed out some similar structural characteristics of authoritarian rule,[261] while others, such as Mecklenburg-Vorpommern's Justice Minister Ulrich Born (CDU), had used the equating term of 'totalitarian *Unrechtsregime'* – be it negligently or deliberately.[262]

Trittin's speech provoked some criticism, especially by Bayern's Justice Minister Alfred Sauter (CSU),[263] which, in turn, prompted Jürgen Trittin to assure his colleagues that the Greens did not object to the intention of extending limitation periods; what they did demand, however, was to drop the term of *'SED-Unrecht'* and to formulate a draft that was 'impeccable with respect to the rule of law, and politically true'.[264] Now, in turn, Sauter felt called-upon to point to a hitherto broad consensus that all injustice in the GDR had been driven by the SED, thereby defending the term 'SED-crimes'. But leaving aside this skirmish, Sauter pointed

[259] '[o]hne die '…Duldung vieler, ohne Mitläufer und ohne unzählige Mittäterinnen und Mittäter aus Not wie Gelegenheit…'.
[260] 'Ist es nicht vielleicht auch möglich, … Unrecht in der DDR zu benennen, ohne diese Analogie zu verwenden und damit die Singularität des industriell organisierten Völkermordes der Nationalsozialisten gleichzeitig in Frage zu stellen?'
[261] ibid., p. 110-11.
[262] ibid., p. 105-07.
[263] ibid., p. 108-09.
[264] 'rechtsstaatlich einwandfreie und politisch wahr', ibid.

something out that threatened to be forgotten: that the question at hand was indeed a political question and not merely a judicial issue.[265]

Ulrich Born, Mecklenburg-Vorpommern's Justice Minister, advertised the first, but also the more sweeping second, draft bill. He believed that it was the judicial branch's task, '(…)to deal with the legacy of the 40-year rule of a totalitarian [*Unrechts*-] regime with the means of the criminal law'.[266] Born pointed to an excessive workload on the judiciary problems arising from the re-organisation of the branch in his state to make a case for extending limitation periods. Moreover, a flood of criminal complaints was expected after the *Stasi's* files had been opened to the public only a few weeks before.[267] Born stressed that extended limitation periods would simplify to bring former potentates over the coals. Born thought it would be 'intolerable' [268] to prosecute only those who actually carried out government crimes, just because their deeds could be proven so much more easily.[269] He also emphasised that it was crucial to include minor crimes, as this category often included 'typical SED-crimes'.[270]

Remarkably, the more sweeping second draft bill (extension of limitation periods) not only intended to enable prolonged prosecution of GDR government crimes – i.e. deeds committed before the GDR's dissolution on 3 October 1990, but also meant to extend limitation periods for *all* medium-weight crimes committed in the territories of the GDR up until 31 December 1991. In public debate, this

---

[265] ibid.

[266] '(…) die Hinterlassenschaft der 40-jährigen Herrschaft eines totalitären Unrechtsregimes strafrechtlich zu bewältigen.', ibid., p. 106.

[267] On the work of the BStU, see e.g. Goldbeck, Marcus: *'Vergangenheit als politische Ressource. Das Beispiel der Stasi-Unterlagen-Behörde (BStU) im Kontext der "Stasi-Debatte"'*, in: Großbölting, Thomas/Lorke, Christoph (eds.): Deutschland seit 1990. Wege in die Vereinigungsgesellschaft, Stuttgart: Franz Steiner 2017, pp. 213-224.

[268] 'unerträglich'.

[269] PA-DBT 4000 XII/245 Bd. A lfd. No. 2, pp. 104f.

[270] 'typisches SED-Unrecht', ibid.

temporal extension was crucial. It meant allowing for prosecution of so-called '*Vereinigungskriminalität*': white-collar crimes from the time immediately preceding and following reunification, e.g. fraud, betrayal of confidence, forgery of documents, etc. These offences had often been committed to the detriment of the Treuhandanstalt, governments, or East German owners. Arguably, for many East Germans, these crimes were a tangible cause for their own social-economic experiences of frustration and degradation. Like with those criminal trials still launched in the late GDR against state and economic leaders of the regime, it reflects the social significance of East Germany's economic downfall with all societal and social frictions and uncertainties related to this. These political circumstances were also discerned by state governments. In the view of Mecklenburg-Vorpommern's state government, criminal prosecution, which really only gained traction in 1992, should therefore not only cover GDR government crimes, but also this unsettling immediate period of state and economic transformation.[271]

Broadly speaking, a general consensus existed among all speakers: the necessity of criminal trials as a measure of 'mastering' the socialist past was undoubted and the concern to enable continued prosecution by firstly asserting that lapse of time could not have happened before 2 October 1990 and secondly by extending limitation periods was widely shared – at least in principle. However, this observation disguises the fact that most states' representatives did not consider the issue significant enough to make a statement. And leaving aside Jürgen Trittin (Bündnis '90/Die Grünen), all those who did speak belonged to centre-right parties, they were part of the conservative camp, i.e. F.D.P., CDU and CSU. Although hardly any opposition was voiced, *Aufarbeitung* had, arguably, become a partisan

[271] Appendix of BR-Drs. 147/92, § 1 (1) and 'Gesetz zur Verlängerung strafrechtlicher Verjährungsfristen (2. VerjährungsG) vom 27. September 1993', Bgbl. I 1993 p. 1657; See also Hans-Joachim Jentsch for Thüringen: PA-DBT 4000 XII/187 Bd. A lfd. No. 2, pp. 104f..

issue, as the deliberations on the second draft bill on limitation periods (see below) demonstrate.

In the following committee stages, both draft bills were separated. For the first bill, which sought to assert that no lapse of time had occured until 1990, a quick progress could be observed. Within two months, the proposal passed all necessary committees in Bundesrat, though with a significant amendment. Overall, both the committee for home affairs (Innenausschuss) and the committee for legal affairs (Rechtsausschuss) considered the matter with a great deal of earnestness.

The home committee discussed broader questions regarding the necessity, desirability and feasibility of criminal trials as a measure of '*Vergangenheitsaufarbeitung'.* When presenting the draft bill, Thüringen's representative claimed that, although it became abundantly clear how little the criminal law could contribute to 'working through' the past, it still was a necessary measure of dealing with government crimes at a time 'when great disappointment is rampant'.[272] Failure to prosecute government crimes would compromise the trust of East Germany's population into the *Rechtsstaat.*[273] It was stressed that prosecution did not follow notions of victor's justice, but applied the GDR criminal code as valid at that time, which the rulers had 'autocratically invalidated' when it suited them.[274] At the same time, the speaker reiterated that the draft bill's regulations merely clarified what had been accepted by most courts as judicial practice, namely the application of such basic principles regarding limitation periods as developed in trials against former Nazis. More precisely: a great majority of judges, lawyers, legal scholars and politicians believed that the lapse of time had

[272] '…große Enttäuschung um sich greift.', PA-DBT 4000 XII/245 Bd. A lfd. No. 4, p. 19-23.
[273] PA-DBT 4000 XII/245 Bd. A lfd. No. 4, p. 19-23.
[274] 'selbstherrlich außer Kraft gesetzt', PA-DBT 4000 XII/245 Bd. A lfd. No. 4, p. 19-23.

been paused until the end of the GDR anyway, as West Germany's courts had established in trials against Nazi perpetrators.

However, Thüringen's representative also touched upon a seemingly legal detail which would dominate almost all political discussions on the subject in coming months. A specific case group presented a theoretical problem, and many lawyers were aware of it: cases, where culpability existed both in former West and East Germany, for example because a GDR border guard, standing on East German soil, had shot a fugitive on West German soil. On the one hand, this case could be subsumed under the draft bill's intention: an East German case of government crime which could not be prosecuted until 1990. On the other hand, as the crime scene was also in West Germany, the prosecution under West German law was not hindered by political will of state leaders, but by the fact that the culprit was able to elude criminal prosecution in West Germany by staying on East German soil. To an extent, this was a case comparable to other crimes where a culprit could not be apprehended before a lapse of time became effective.

The draft bill intended to include such cases where even West German jurisdiction had existed until 1990. However, a majority of federal states opposed this provision. Both in the home committee and in the legal affairs committee, state governments fuelled their worries into successful votes against this contested provision. And while votes on the floor of Bundesrat are based on a finely balanced distribution of votes for each federal state[275], all states have merely one vote in Bundesrat's committees. Here, it's mostly government officials who represent and vindicate their state governments views, which gives discussions a sober and professional face. In any case, in the home affairs committee, Brandenburg successfully submitted a motion to exclude such cases where jurisdiction had lain

[275] According to Art. 51 (2) Basic Law, even the smallest *Länder* (according to the size of the population) have at least three votes in the *Bundesrat*. *Länder* with a population exceeding two million have vour votes, *Länder* with more than six million citizens have five votes. *Länder* with more than seven million citizens have six votes. Cf. Bethge, Herbert: *'Bundesrat. I. Rechtlich',* in: Staatslexikon der Görres-Gesellschaft, Vol. 1, 8th edition, Freiburg: Herder 2017, 825-830.

with East *and* West Germany from the bill to make it bulletproof against reproach of violating the prohibition of retroactive punishment *(nullum crimem, nulla poena sine lege),* as laid down in Art. 103 (2) GG.[276]

In the weeks before, the legal affairs committee and a subcommittee had substantially scrutinised the draft bill. It was asserted that an amendment of limitation periods did not affect the 'material criminal law',[277] and that the Federal Constitutional Court had stated that it was the responsibility of Parliament to resolve a 'conflict between [legal certainty/predictability of legal decisions] and 'justice'.[278] Here, like in the home committee, the eastern state of Brandenburg's government successfully suggested to exclude cases with dual jurisdiction. This motion was passed against the governments of Bayern, Berlin, Hessen, Mecklenburg-Vorpommern, Sachsen and Thüringen. In essence, this means that those who lobbied for a more comprehensive facilitation of criminal trials were conservative-led governments, while, generally speaking, SPD-led West German state governments favoured the more restrictive approach. While this was not an absolute division, , it resembles the political circumstances of the years before 1989 when West German states wrestled over the Central Registration Office.

So, while the basic principles of the draft bill remained unchanged, a majority of states had amended the bill – against the explicit wish of its initiators, so as to exclude such cases where jurisdiction had lain with East and West German authorities alike. This included cases where a shooter stood and fired on East German soil but hit (and potentially killed) a target on West German soil, making this a case where both East and West German jurisdiction was given. According to the amended draft bill, these cases' lapse of time would start according to usual

[276] PA-DBT 4000 XII/187 Bd. A lfd. No. 4.
[277] 'materielles Strafrecht', PA-DBT 4000 XII/187 Bd. A lfd. No. 5 and 6.
[278] '…Konflikt zwischen Rechtssicherheit und Gerechtigkeit', in: PA-DBT 4000 XII/187 Bd. A lfd. No. 4. See also BVErfGE 25, 290.

regulations, counting from the time of offence. Thus, in many cases especially of deadly shots at fugitives, but also spy crimes on West German soil, lapse of time would have become effective already and prevent any further criminal proceedings.[279]

The second and final reading of the draft bill was short and in principle elicited consensus.[280] Despite a legal consensus held that the lapse of time had for political crimes had rested between 1949 and 1990, legislators opted to re-affirm this view in statute. Thüringen's Justice Minister, Hans-Joachim Jentsch (CDU), welcomed the shared awareness for the problem at hand. This, he believed, marked a political shift. And in fact, it was only in autumn 1991 that a majority of Justice Ministers from the state governments had agreed *not* to pursue any legislative action for extending limitation periods.[281] Rainer Funke, parliamentary state secretary state at the Federal Ministry of Justice, claimed that citizens in the East had 'put their hope and trust into our *Rechtsstaat*'.[282] Rightfully, they expected that 'those responsible for 40 years of injustice, oppression and lost opportunities would finally be called to account'.[283] Their sympathy for slow judicial proceedings was limited, he believed. Hence, effective criminal prosecution of GDR perpetrators was important: 'It is not about revenge and retaliation or even about victorious justice. It is about the implementation and enforcement of the rule of law.'[284] Even though the GDR itself was not equated with the Third Reich, a comparison was drawn to judicial

[279] BR-Drs. 141/1/92, Entwurf eines Gesetzes zur Verjährung von SED-Unrechtstaten (VerjährungsG), PA-DBT 4000 XII/187 Bd. A lfd. No. 7.
[280] 'Stenographischer Bericht der 642. Sitzung des Bundesrates', 15 May 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 11.
[281] PA-DBT 4000 XII/187 Bd. A lfd. No. 2, pp. 104f., 108.
[282] '…Hoffnung und Versauen in unseren Rechtsstaat gesetzt.', 'Stenographischer Bericht der 642. Sitzung des Bundesrates', 15 May 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 11, p. 225.
[283] '…die für 40 Jahre Unrecht, Unterdrückung und vergebene Lebenschancen Verantwortung tragen, jetzt endlich zur Rechenschaft…', ibid.
[284] 'Es geht nicht um Rache und Vergeltung oder gar um Siegerjustiz. Es geht um die Verwirklichung und Durchsetzung des Rechtsstaats', ibid. pp. 225f.

attempts to prosecute former Nazi perpetrators.[285] For Hessen, a written statement was submitted in lieu of a parliamentary speech. Hessen's Justice Minister endorsed the bill, especially in light of a special interest of the *'neue Länder'* to clarify a legally vague situation.[286]

The special case of crimes with dual jurisdiction remained a contested topic. Hans-Jürgen Jentsch refuted the amendments made to the original draft bill in this matter. Remarkably, representatives of those federal states which had pushed through the amendment in question in the committees remained silent throughout the debate.

Again, only Jürgen Trittin (Bündnis '90/Die Grünen), Niedersachsen's Minister for Federal and European affairs, rose to speak and to reiterate the point he had previously made on the bill's ideological terminology. He suggested that, while the bills main provisions ought to remain unchanged, the crimes should be referred to as 'GDR crimes' as opposed to 'SED' crimes to properly include those acts which had been carried out by state officials who were not member of the SED. For instance, he claimed that the failure to prosecute GDR government crimes *in the GDR* lain in the responsibility of the Justice Ministers who had always been members of the Liberal-Demokratische Partei Deutschlands (LDPD), a so-called 'block party' which had consistently supported the SED: 'If you take these facts out of the draft bill, if you conceal co-responsibility and complicity with the great master perpetrator, and concentrate on this very master perpetrator, then I tell you that with such formulations in the law (...) you do not reproduce history correctly and completely.'[287] His claim was firmly rejected by conservative politicians. Herbert Helmrich (CDU), Justice Minister of Mecklenburg-Vorpommern, claimed

[285] ibid.

[286] ibid., p. 253.

[287] 'Wenn Sie diese Tatsachen aus dem Gesetzentwurf herausnehmen, Mitverantwortung und Mittäterschaft neben dem großen Haupttäter verschweigen und auf eben diesen Haupttäter konzentrieren, dann sage ich Ihnen, daß Sie mit Formulierungen im Gesetz (…) die Geschichte nicht korrekt und vollständig wieder[geben].', ibid., p. 224-25.

that the SED and in particular the party's *Zentralkommittee* had been the power centre of the GDR. Hans-Jürgen Jentsch warned against causing confusion with such terminological debates. 'This could also be misunderstood by the people in the *neuen Ländern,* because they have an interest that we act together at least where here in a difficult situation for the western legal order…'. [288] Finally, Niedersachsen's motion for a change in the draft bill's terminology was rejected. The draft bill as it had left the committees, excluding cases of dual jurisdiction, was passed and sent on to the Bundestag.[289]

Overall, the Bundesrat debates as well as the committee proceedings can be characterised as calm and sober, only occasionally more lively when Jürgen Trittin (Bündnis 90/Die Grünen) made his statements. However, it also must be noted that those state governments that advocated a more restrictive bill remained silent throughout most of the Bundesrat proceedings, including floor debates. By and large, only supporters – or more precisely: initiators – of the draft bill rose to speak. A 'silent majority' (Elisabeth Noelle-Neumann) of state governments remained silent, yet dictated the course of action. They mitigated the draft bill by excluding potentially legally problematic cases of dual jurisdiction from the suspension of limitation periods. Perhaps, this was owed to legal prudence and a caution to prevent the Federal Constitutional Court from striking the law down for unconstitutionality altogether. But, due to most West German governments' silence, it appears worthy to note that there is a remarkable line of continuity. Those West German governments who successfully watered down the draft bill were also mostly those governments who, before 1990, repeatedly attempted to close the *ZESt*

[288] '[d]as könnte auch von den Menschen in den neuen Ländern falsch verstanden werden, denn diese haben ein Interesse daran, daß wir angesichts einer für die westliche Rechtsordnung schwierigen Situation – das westliche Recht wird nicht überall als allgemein ausreichend und der Lage gerecht werdend begriffen – gemeinsam wenigstens dort tätig werden können…', ibid., p. 223-24.

[289] BR-Drs. 141/92 (Beschluß): 'Entwurf eines Gesetzes zur Verjährung von SED-Unrechtstaten (VerjährungsG)', Gesetzentwurf des Bundesrates, 15.05.1992, 'Stenographischer Bericht der 642. Sitzung des Bundesrates', 15 May 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 12.

(see chapter 1). Given a close temporal proximity, and a continuity in those SPD-led governments for the most part, it is fair to say that their course of legislative action stone in a tradition of favouring a less aggressive course of judicial action against GDR government crimes, and to (unsuccessfully) enforce such a course by legislative and administrative steps. At the same time, those who initiated and defended the draft bill were mostly East German conservative state governments, backed up by a few West German conservative governments.

The 1. Verjährungsgesetz in Bundestag

In Germany's federal parliament, Bundestag, two parties had also recognised need for action. Remarkably, other than in the state governments, the legislative move came from Greens and Social Democrats. The Green's draft bill[290] deplored that 'no internationally recognised criminal law' existed which could 'sanction criminal deeds of unjust regimes…'. Moreover, it became obvious that the 'national criminal law was inadequate and the *Rechtsstaat* struggled with the criminal *Aufarbeitung'* of the GDR. This draft bill's regulations were akin to the Bundesrat's initiative, with only the title differing, as it named the government crimes in question *'DDR-Unrechtstaten'* rather than *'SED-Unrechtstaten'*, just as Niedersachsen's Green Minister Jürgen Trittin had suggested in the states' chamber.[291]

Yet a few weeks earlier, still in February 1992, the SPD parliamentary group submitted a motion (not a draft bill) that Bundestag should declare that limitation periods had been suspended until 3 October 1990 for such crimes in the GDR which

[290] Deutscher Bundestag, 12. Wahlperiode, Drs. 12/2332, PA-DBT 4000 XII/187 Bd. A lfd. No. 16.

[291] For both quotations: 'Ein internationales, völkerrechtlich anerkanntes Strafrecht, das die Straftaten von Unrechtsregimen sanktioniert und von der Staatengemeinschaft der welt anerkannt wird, gibt es nicht.' 'Es zeigt sich, daß das nationale Strafrecht ungenügend ist und der Rechtsstaat Schwierigkeiten mit der strafrechtlichen Aufarbeitung der Unrechtstaten der SED-Diktatur hat.' in: Deutscher Bundestag, 12. Wahlperiode, 'Entwurf eines Gesetzes zur Berechnung strafrechtlicher Verjährungsfristen von DDR-Unrechtstaten', 24.03.1992, Drs. 12/2332, PA-DBT 4000 XII/187 Bd. A lfd. No. 16.

had not been prosecuted 'for political reasons'. At the same time, the motion emphasised the importance of '*juristische Aufarbeitung'* such crimes as an 'important task of the democratic *Rechtsstaat'.*[292] Remarkably, this motion was drafted and submitted even before the original draft bill was introduced to Bundesrat.

In this draft's first reading in May 1992, Bundestag confronted itself with questions of limitation periods and the facilitation of continued criminal prosecution of transitional justice for the first time.[293] This debate was, at least in my view, characterised by argumentative rigour and a high intellectual level. Again, speakers' addresses reflected a broad consensus on the question whether limitation periods had rested until 1990. However, speakers differed more fundamentally on the justification for this assumption. Moreover, technical aspects were contested, such as the question of what end date should be stated for the pausing of limitation periods, or whether cases of dual jurisdiction should be included – the same questions that had been highlighted during Bundesrat debates.

The need for some form of parliamentary action was hardly doubted. In the eyes of most MdBs, the principles of suspended lapse of time, as developed by high courts in cases against former Nazi perpetrators, had to be applied to this category of crime anyway. However, since a few state prosecutors had decided otherwise when they assumed an effective lapse of time, legal uncertainty was soaring and a clarification was needed. And since a high court ruling could only be expected in a few years from the time, Bundestag should take action, as Hans de With (SPD) demanded. For CDU/CSU, Michael Luther fought the same corner when claiming

[292] '…aus politischen Gründen…'; 'judicial Aufarbeitung'; '…eine wichtige Aufgabe des demokratischen Rechtsstaats…', in: Deutscher Bundestag, 12. Wahlperiode, 'Antrag zur Verfolgungsverjährung von Unrechtstaten in der ehemaligen Deutschen Demokratischen Republik', 19.02.1992, Drs. 12/2132, PA-DBT 4000 XII/187 Bd. A lfd. No. 17.

[293] 'Stenopraphischer Bericht der 91. Sitzung des Deutschen Bundestages', 12. Wahlperiode, 7 May 1992, pp. 7518-30, PA-DBT 4000 XII/187 Bd. A lfd. No. 18.

that a 'constitutional, problem-solving and practical‘ bill needed to be found.[294] Jörg van Essen (FDP) added that through the work of the BStU, people would only become aware of many crimes that they had suffered in coming years, so that even an extension of limitation periods could be discussed.[295] More contested, however, was how parliamentary action could be justified.

Except for the PDS, all parties agreed that a some form of clarification by the Bundestag was needed on the matter. But this broad consensus must not camouflage the fact that stark differences existed regarding the principal justification and legal substantiation behind this measure. For SPD, CDU/CSU and FDP, judicial precedent and legislative measures related to criminal trials against former Nazi perpetrators served as basis for their justification. Principles of suspended limitation periods could be applied without any doubt, as Hans de With claimed for the Social Democrats. Likewise, Michael Luther (CDU/CSU) defended the logical deduction of suspended limitation periods from legal precedent, claiming that that the will of state and party leadership had quasi-legal meaning in the application of laws.[296] Yet, speakers were always cautious to avoid an equalisation of Third Reich and GDR, but certain structural parallels had to be identified in order to justify the transfer of the legal argument. Jörg van Essen (FDP) warned that all needed to be done to prevent claims of a failure of judicial *Vergangenheitsaufarbeitung* of the GDR, as had been uttered in certain jubilee events 40 years after the end of World War II: 'We have a responsibility not to be accused of anything similar on the 40th anniversary of German reunification.‘[297]

---

[294] 'verfassungskonforme, …problemlösende und praktikable Gesetzesvorlage‘, Michael Luther, ibid., pp. 7521f..

[295] 'Wir stehen in der Verantwortung, daß bei dem 40. Jahrestag der deutschen Wiedervereinigung nicht ein ähnlicher Vorwurf gegen uns erhoben wird.’, ibid., pp. 7522f.

[296] 'verfassungskonforme, …problemlösende und praktikable Gesetzesvorlage‘, Michael Luther, pp. 7521f.

[297] 'Wir stehen in der Verantwortung, daß bei dem 40. Jahrestag der deutschen Wiedervereinigung nicht ein ähnlicher Vorwurf gegen uns erhoben wird.’, ibid., pp. 7522-23.

An alternative route to the same destination was taken by the Greens. Wolfgang Ullmann rejected a 'mechanical‘ equalisation of Nazi crimes with GDR crimes. Hence, their proposal took another route to develop a legally impermeable justification for their draft bill. He drew a line from the World Wars as the origin of unprecedented crimes: 'Since the beginning of the world wars, the combination of violence with treachery, cruelty and cowardice has been considered justified. The fight against the defenceless became the rule.’[298] Both World Wars had been the gateway to a new and unprecedented kind of crimes committed in the name of states. This had led to the passing of the momentous *Kontrollratsgesetz No. 10* in occupied Germany, which enumerated new categories of crimes: crimes against peace, war crimes, crimes against humanity. Ullmann continued to argue that all provisions of this law had been transposed into the GDR’s constitutions and criminal codes, which did not prevent her from undermining these very regulations: 'One of the powers of the anti-Hitler coalition [i.e. the Soviet Union and the GDR]… solemnly confessed themselves ... to the principles of peace, humanity and human rights. But that didn't stop them from adding another dark chapter of political inhumanity to the history of this century.’[299] For Ullmann, this physical and moral 'liquidation of human dignity‘[300] by the Soviets and their satellite states culminated in planful and deliberate mass rape of German women in 1945 and a series of show trials in the 1930s and 1950s. The proposed legislation thus intended to declare that all communist 'crimes against peace and humanity‘ would be known and had to await their condemnation.[301]

---

[298] 'Seit dem Begin der Weltkriege galt die Verbindung von Gewalt mit Heimtücke, Grausamkeit und Feigheit als gerechtfertigt. Der Kampf gegen Wehrlose wurde die Regel.’ Wolfgang Ullmann, ibid., p. 7519.

[299] 'Eine der Mächte der Anti-Hitler-Koalition [und die DDR]… bekannten sich selbst … feierlich zu den Prinzipien des Friedens, der Menschlichkeit und der Menschenrechte. Aber das hat sie nicht gehindert, die Geschichte dieses Jahrhunderts um ein weiteres dunkles Kapitel politischer Unmenschlichkeit zu vermehren.’ Wolfgang Ullmann, ibid., p. 7519.

[300] 'Liquidation der Menschenwürde’, ibid.

[301] 'Verbrechen gegen den Frieden und die Menschlichkeit‘, ibid.

The practical questions that had to be solved were widely seen: jurisprudential precedent from the 1950s and onwards could hardly define when exactly the lapse of time would start to count. Here, a legal clarification was needed and the speakers in Bundestag and Bundesrat differed as to if this date should be set on the 17 March 1990, the day before East Germany's first and only free parliamentary election, or the 2 October 1990, the last day of the GDR. Practically, however, this decision was meaningless, as the Treaty on German Unity had stated that all limitation periods would be interrupted by German reunification. Under the regulations of (West) Germany's criminal code, this meant that they would start anew. Hence, one way or another, the calculation of lapse of time would commence on 3 October 1990 anyway. So, the decision which date should be chosen was purely symbolic: was the free election of the GDR's Volkskammer to be seen as the end of German state socialism and the beginning of the rule of law, or only East Germany's accession to the FRG? Another contentious issue identified was the question which had already shaped debates in Bundesrat: how to deal with cases of dual jurisdiction

But this parliamentary debate also presented an opportunity to embark on a discussion of larger and more fundamental questions of *Vergangenheitsaufarbeitung,* justice, and the role of the criminal law in achieving these goals. It appears that speakers were somewhat torn between skepticism if criminal prosecution could facilitate *Aufarbeitung,* while adhering to its necessity anyway. Michael Luther (CDU/CSU), for instance, suggested that

> 'This tangled web of injustice ... requires an uncanny expenditure of energy ... and does not bring a single investment, not a single job. ... But the GDR past cannot be overcome with a repression mechanism. It must ... be dealt with. Drawing a line, that also means silently granting the Stasi snoopers and Stasi gangsters amnesty. ... We can't avoid it: what made the GDR inhuman must come to light.'[302]

[302] '[d]ieser Wust von Unrecht … erfordert eine unheimliche Kraftaufwendung … und bring nicht eine einzige Investition, nicht einen einzigen Arbeitsplatz. … Aber mit einem Verdrängungsmechanismus läßt sich die DDR-Vergangenheit nicht bewältigen. Sie muß … aufgearbeitet werden. Schlußstrich ziehen, das heißt ja auch, dem Stasi-Schnüffler und Stasi-Gangster stillschweigend Amnestie einzuräumen. … Wir kommen nicht darum herum: Was die DDR unmenschlich machte, muß ans Tageslicht.' Michael Luther, ibid., p. 7521f.

At the same time, Hans de With (SPD) had limited expectations. Criminal trials could not deliver 'absolute justice‘ for past governments. 'Judicial enlightment’ could not facilitate 'coming to terms with the past: we have to do it on our own'.[303] as he claimed, whoever 'we‘ might have been in this statement. By contrast, Wolfgang Ullmann (Bündnis ’90/Die Grünen) pointed to the international dimension of the questions faced by German courts. He said he had a feeling that this proposed legislation as an act of enabling criminal prosecution of government crimes was of 'larger relevance'. It would transcend national boundaries and it was important to him that Bundestag clarified that 'crimes against humanity are crimes, whoever commits them, and wherever they take place.‘[304]

Solely Uwe-Jens Heuer (PDS) rejected the broad, cross-party consensus. He profoundly doubted both the appropriateness and the feasibility of comprehensive legal action against former regime elites and subordinates. He emphasised the singularity of Nazi war crimes and genocides. Their unmatched magnitude alone had justified the Federal Constitutional Court’s decision to assume a suspension of the lapse of time in their court ruling in 1952. Heuer was convinced that the GDR could not be subsumed under the same category: ’Until the end, the GDR was not a *Rechtsstaat*. But that doesn't (…) justify its characterisation as an *Unrechtsstaat*. The concept of the *Unrechtsstaat* proves to be a questionable combat term.’[305] Hence, grave reasons were needed to prosecute minor crimes which, occasionally, dated back more than 40 years ago. Heuer also directed his audience’s gaze towards present challenges. Against the backdrop of a 'crisis of economical adjustment‘,[306]

---

[303] 'richterliche Aufklärung‘,'Aufarbeitung der Vergangenheit: Das haben wir selbst zu leisten‘. Hans de With, ibid., p. 7520.
[304] 'Verbrechen gegen die Menschlichkeit sind Verbrechen, von wem auch immer sie begangen werden… [und] wo auch immer sie ans Tageslicht kommen.', Wolfgang Ullmann, ibid., p. 7520.
[305] '[Die] DDR war bis zum Schluß kein Rechtsstaat. Das aber rechtfertigt … nicht ihre Charakterisierung als Unrechtsstaat. Der Begriff des Unrechtsstaates erweist sich als fragwürdiger Kampfbegriff.’, Uwe-Jens Heuer, 'Stenographischer Bericht der 91. Sitzung des Deutschen Bundestages', 12. Wahlperiode, 7 May 1992, p.7523-25, PA-DBT 4000 XII/187 Bd. A lfd. No. 18.
[306] 'Krise der ökonomischen Anpassung‘, ibid

it was necessary to ask whether the grave societal situation should be destabilised even further by 'hundreds of thousands of penal proceedings'?[307] Instead, the PDS suggested to enable criminal prosecution only for 'really grave crimes'.[308] Apart from that, a reconciliatory approach was demanded.

Reinhard Göhner, Parliamentary Secretary of State (CDU) in the Federal Ministry of Justice, that is, a second-tier member of the federal government, decided to submit his strong speech in written form just for the record. Like Heuer, he acknowledged the grave economic transformation which East Germany underwent, but he thought that achieving 'inner unity'[309] was the even bigger challenge and even more important condition for overcoming the GDR's '*Unrechtsregime'.* In his view, this included taking both victims and perpetrators into account, whilst also acknowledging the limits of the rule of law: 'A constitutional [*rechtsstaatlich*, P.E.] criminal law is not a flaming sword of revenge with which the state retaliates.'[310] In trying to justify penal action, he uttered a familiar argument, namely that such trials would be no case of revenge and retribution, let alone of victor's justice. Instead, he claimed it was about 'the implementation and enforcement of the rule of law.'[311] It remained a logical inconsistency throughout this legislative process that this claim was often accompanied by the declaration that the GDR was an *Unrechtsstaat.* It could be asked how such criminal trials and the enabling legislation were seen as merely enforcing the *Rechtsstaat* and GDR laws when this state and its laws were disqualified as *Unrechtsstaat* at the same time.

Eventually, both the Greens' draft bill and the SPD's declaratory motion were sent into the committee for legal and home affairs.[312] Here, it appears, the proposals

[307] 'Hunderttausende von Straftaten', ibid.
[308] 'wirklich schwere Verbrechen', ibid.
[309] 'innere Einheit', Reinhard Göhner, ibid., pp.7528-30.
[310] 'Ein rechtsstaatliches Strafrecht ist kein flammendes Racheschwert, mit dem der Staat Vergeltung übt', Reinhard Göhner, ibid., p.7528-30,
[311] 'die Verwirklichung und Durchsetzung des Rechtsstaats', ibid.
[312] Deutscher Bundestag, 12. Wahlperiode, 'Amtliches Protokoll der 91. Sitzung', 7 May 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 19.

were held back until the Bundesrat's initiative could join them once Bundestag would receive the draft bill. So, before anything happened in the committees, the states' initiative was passed in Bundesrat and submitted to Bundestag for deliberation, where the first reading took place in September 1992.[313]

In this short debate, the arguments brought forward were largely the same as in the debate on a few months before. The view that limitation periods of political crimes in the GDR had been suspended, and that a law could and should clarify this declaratively, was almost uncontested. Again, legal challenges faced by courts when dealing with socialist government crimes were compared to those faced by West Germany's judiciary when dealing with Nazi perpetrators. This comparison served as a justification for interfering with statutory limitation periods. Particularly noteworthy are a series of statements made which related criminal trials, and more specifically the planned legislation, to broader questions of post-revolutionary justice, East Germany's economic situation and suggested expectations of 'the people' in the *Neue Länder.* Especially against the backdrop of xenophobic violent riots in Rostock in August 1992, but probably also hinting towards widespread frustration with the economic transformation in East Germany, Hans de With (SPD) suggested that Bundestag had to demonstrate to East Germans that it made an effort to clear away 'unjustified barriers' of a 'justified desire'.[314] Likewise, Michael Luther (CDU/CSU) was critical of a 'dissatisfying' legal *Aufarbeitung.*[315] East Germans' trust in the rule of law suffered, as only negative personal consequences would be experienced, such as rocketing unemployment, anxiety about the future and rising figures of asylum seekers. Luther also saw this reflected in the riots in Rostock and the frustration uttered over the judiciary's failure to sentence a high-

[313] If not specified otherwise in following footnotes, look here for quotations and references of the following floor debate: Deutscher Bundestag, 12. Wahlperiode, 'Amtliches Protokoll der 107.' Sitzung, 24 September 1992, pp. 9116-22, PA-DBT 4000 XII/187 Bd. A lfd. No. 14.
[314] 'unberechtigte Barrieren'; 'berechtigtes Verlangen'; ibid., pp. 9116f.
[315] 'unbefriedigend'; Michael Luther, ibid., pp. 9118f.

ranking GDR leader so far. Luther claimed that victims of state crimes were entitled to *Vergangenheitsbewältigung,* which speedy legislation should ensure.[316] The Federal Minister of Justice, Sabine Leutheusser-Schnarrenberger (F.D.P.) also amalgamated legal and political arguments: Without quoting any evidence, she suggested that East Germans had 'lacked, longed for and invested their hopes into the *Rechtsstaat'.*[317] Rightfully, she said, East Germans expected that those who were responsible for '40 years of injustice, oppression and missed life chances' be brought to justice and that this was primarily seen [by East Germans; P.E.] as bringing them into court.[318] Still, she admitted that the criminal law was an inadequate tool for facing systemic injustice. In my view, her remarks reflected a widely-known notion of most politicians of the time (and still to date) to know 'what the people want'. Still, by including missed life chances in her speech, she extended her claim to justice beyond justiciable deeds and charged it with the unreachable task of also making amends for personal frustrations.

Again, only the PDS' Uwe-Jens Heuer rejected the very idea of all draft bills. In suspending limitation periods, which Heuer saw as a way of retroactive punishment, the draft bills did exactly what they accused the GDR of: violating the rule of law. Moreover, he saw this as yet another instance of special laws for East Germany, probably hinting towards divergent regulations of pensions entitlement in both parts of the republic, as introduced after German unity.[319] He drew a dramatic picture of the social and legal situation in the East: referring to Bärbel Bohley's famous dictum *('Wir wollten Gerechtigkeit und bekamen den Rechtsstaat'),* he argued that East Germans had received neither justice nor the *Rechtsstaat.* Instead, he quoted Hessen's Environmental Minister, Joschka Fischer (who later rose to become *de facto* leader of the Greens and Foreign Minister):

---

[316] ibid.

[317] 'entbehrt', 'herbeigesehnt', 'auf ihn ihre Hoffnungen gesetzt', Sabine Leutheusser-Schnarrenberger, ibid., pp. 9121f.

[318] '40 Jahre Unrecht, Unterdrückung und vergebene Lebenschancen'; ibid.

[319] Jens-Uwe Heuer, ibid., pp. 9119-21

> 'If one consistently applied the moral, legal and political standards of coming to terms with the Stasi past in East Germany to our legal system, the constitutional state of Germany would remain nothing but a gruesome distortion'.[320]

Heuer continued to argue that in passing the bill, this 'gruesomely distorted picture‘ would be intended and continued: 'Whoever passes this law does not want legal peace, but legal war.'[321]

Bundestag’s committee for home affairs and the budget committee passed the bills without extended debate within a fortnight, suggesting that they proceed with the Bundesrat draft and leave the Greens’ draft bill and the SPD’s motion aside, as they pursued the same aim. Naturally, the leading committee for legal affairs subjected the draft bills to greater scrutiny.[322] In a committee session which was held in Weimar (probably to show political sympathy and presence in East Germany and especially at the birth place of the Weimar constitution), the legal affairs committee showed a broad consensus on the legality and desirability of this statutory clarification. Three open questions remained to be discussed. Firstly, if the 17 March or 2 October 1990 should be taken as end date for the suspension of limitation periods (eventually, the 2 October was chosen, but this had no practical relevance anyway, *see above*). Secondly, if an enumerative catalogue of crimes that fell within the category should be included as an example (eventually, this paragraph was deleted). Finally, and most contested, if crimes where jurisdiction had existed in West Germany *as well as* in East Germany should be included or not. Committee members were cautious not to jeopardise the whole intended law to be struck down by the Federal Constitutional Court only because this specific

[320] 'Übertrüge man konsequent die moralischen, rechtlichen und politischen Maßstäbe der Aufarbeitung der Stasi-Vergangenheit in Ostdeutschland auf unser Rechtssystem, so bliebe vom Rechtsstaat Deutschland nur noch ein schauriges Zerrbild‘, ibid.

[321] 'Wer dieses Gesetz beschließt, … will nicht Rechtsfrieden, sondern Rechtskrieg', ibid.

[322] Deutscher Bundestag, 12. Wahlperiode, 'Ergebnisprotokoll der 40. Sitzung des Innenausschusses', 7 October 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 21; Deutscher Bundestag, 12. Wahlperiode, 'Ergebnisprotokoll der 45. Sitzung des Haushaltsausschusses', 7 October 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 23.

provision (Article 2) might be flawed. To avoid this and to get legal clarification, the committee eventually decided to summon an expert hearing on the matter.[323] Only Uwe-Jens Heuer continued to object to the very idea of suspending limitation periods. He believed that the GRT had intended 'to draw a line – for whatever reason'. [324] Moreover, quoting Christoph Schaefgen (head of the unit on government crime in Berlin's prosecution authority), he claimed that potentially hundreds of thousands of investigations were still to come. This would likely usher in a state of constant threat of coming under legal investigation for many East Germans in the next five to seven years. Heuer considered this too grave a strain on the East Germans, especially in the light of economic misery.[325]

Four law professors were heard in the legal committee's expert hearing on 11 November 1992: Michael Bothe (Frankfurt), Bodo Pieroth (Marburg), Friedrich-Christian Schroeder (Regensburg), and Herbert Tröndle, President of the District Court of Waldshut-Tiengen and honorary professor in Freiburg. They were asked if there were reasons to believe that a declaratory statement confirming the suspension of prison sentences, as intended with Article 1 of the Bundesrat's draft bill, violated the constitution. The same was asked for the bill's second article which included cases of dual jurisdiction into this statement. Lastly, it was also asked whether an extension of limitation periods for medium-heavy crimes from five to eight years was seen as possible and necessary, since Jörg van Essen (F.D.P.) had urged his colleagues to discuss the matter both on the floor as well as in the committee. Committee members and those four law professors (and, in one case,

[323] Deutscher Bundestag, 12. Wahlperiode, 'Stenographisches Protokoll der 50. Sitzung des Rechtsausschusses', 07 October 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 24; Deutscher Bundestag, 12. Wahlperiode, 'Stenographisches Protokoll der 52. Sitzung des Rechtsausschusses', 14 November 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 25; Deutscher Bundestag, 12. Wahlperiode, 'Beschlußempfehlung und Bericht des Rechtsausschusses', Drs. 12/4110, 18 January 1993.

[324] 'Der zweite Staatsvertrag wollte, aus welchen Grünen immer, einen Schlussstrich ziehen…'; Uwe-Jens Heuer, Deutscher Bundestag, 12. Wahlperiode, 'Stenographisches Protokoll der 50. Sitzung des Rechtsausschusses', 07 October 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 24.

[325] ibid.

practitioners) engaged in an intense legal debate about those and some even more specific questions. The session's record fills 46 forty-six densely typed pages, and the experts' written statements submitted upfront fill another sixty pages. Essentially, only Bodo Pieroth, an expert on constitutional and public law questions, was skeptical of the legality of the endeavour. Herbert Tröndle, a judge himself, found a surprisingly sober answer to the question, if NS and GDR could be compared: notwithstanding all qualitative and quantitive differences between the two regimes, both regimes prevented proper criminal prosecution of government crimes. According to Tröndle, that was all that counted in this subject matter. Therefore, Tröndle argued that the suspension of limitation periods had been legitimate both after the end of the 'Third Reich' as well as after the demise of the GDR.[326]

A month later, the legal committee met again for a refreshingly short final debate on the matter. Almost all speakers now agreed on the constitutionality of the draft bill. The end date was determined as the 2 October 1990 and the title changed, following a suggestion of the Federal Government. The originally planned, but merely enumerative and exemplary, catalogue of crimes was dropped while those highly contested cases of dual jurisdiction remained included in the bill. Chairman Horst Eylmann (CDU) justified this by suggesting that failure to incorporate such cases – that is, to enable continued prosecution also in such cases – could not be understood by anyone, thereby bringing a legal common sense into the equation. Again, only Uwe-Jens Heuer opposed the draft bill fundamentally, also by referring to passages of the expert reports that warned to be cautious or uttered reservations about the extent of the planned bill. Politically, he reiterated his apprehension that at least tens of thousands of cases would be looming in the coming seven years,

[326] Deutscher Bundestag, 12. Wahlperiode, 'Protokoll der 56. Sitzung des Rechtsausschusses', 11 November1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 26.

thereby creating a state of fear and insecurity among East Germans.[327] Eventually, however, and hardly surprisingly, the amended draft bill was passed almost unanimously for final debate on the floor.[328]

The final debate on the floor, the second and third reading on 24 January 1993 once again highlighted to what extent the regulations in question touched upon highly political issues: questions of justice, questions of the legitimacy and usefulness of legal *Vergangenheitsaufarbeitung,* but also on striking a fair balance of powers between branches of government. At the same time, speakers (who were the same specialists who had been present during the first reading and the committee meetings) relied mostly on familiar arguments. This final debate came only days after Erich Honecker had been released from detention pending trial after Berlin's district court (Landgericht) had refused to formally open a case against him on medical grounds.[329]

Remarkably, the idea of courts and laws having to acknowledge a certain common sense with respect to criminal regulations was highlighted by speakers from different sides of the political spectrum. Michael Luther (CDU) for example claimed that the 1. Verjährungsgesetz legally clarified, 'what the ordinary citizen thinks'.[330] Likewise, referring to Honecker's release, Hans de With (SPD) reminded that the legal branch of their responsibility was to rule in a responsible manner:

---

[327] Deutscher Bundestag, 12. Wahlperiode, 'Beschlußempfehlung und Bericht des Rechtsausschusses', 18 January 1993, Drs. 12/4110, PA-DBT 4000 XII/187 Bd. A lfd. No. 28. Deutscher Bundestag, 12. Wahlperiode, 'Kurzprotokoll der 59. Sitzung des Rechtsausschusses', 9 December 1992, PA-DBT 4000 XII/187 Bd. A lfd. No. 27.

[328] Deutscher Bundestag, 12. Wahlperiode, 'Beschlußempfehlung und Bericht des Rechtsausschusses', 18 January 1993, Drs. 12/4110, PA-DBT 4000 XII/187 Bd. A lfd. No. 28.

[329] Beschluss des Landgerichtes Berlin, 13 January – 514-35/92 –, in: Neue Juristische Wochenschrift 1993, p. 1608.

[330] 'was der normale Bürger denkt', 'Stenographischer Bericht der 134. Sitzung des Deutschen Bundestages', 12. Wahlperiode, 21 January 1993, PA-DBT 4000 XII/187 Bd. A lfd. No. 29, p. 11666.

> 'It is beyond dispute that in every decision, however serious the accusation may be, the human dignity must not be violated. It is also beyond dispute (…) that no government may be involved in legal proceedings. But it should also be beyond dispute that in a case like this – and law is spoken in the name of the people – there should be a lasting rethink of how to judge in a more comprehensible and understandable way for the ordinary citizen. This concerns us all.'[331]

Still, he reminded his audience of his conviction that the draft bill – and hence the enabling of continued criminal prosecution – was not an act of revenge or political justice, but of enforcing GDR law, as all relevant crimes had also been criminal in the GDR. Therefore, the aim of this bill was to realise the state's punitive claim in individual cases.[332] Horst Eylmann (CDU/CSU) used his time to urge his colleagues and the general public to reflect on the normative foundations of 'our *Rechtsstaat',* as the debate about legal details – especially as brought forward by the Federal Ministry of Justice*,* as he criticised – had shown a lack of orientation in the technical regulations of the criminal law and the constitution.[333] The will of the people – or what was believed to be the will of 'the people' – once again served as a resource of legitimacy for this legislation. Rainer Funke (FDP), parliamentary secretary of state at the Federal Ministry of Justice*,* claimed that Germans in the East expected that those liable for the authoritarian regime would be brought to justice. In order to justify this invasion of regulations on the lapse of time, parallels to challenges faced by West German authorities when prosecuting Nazis were drawn, as already established in the committees. Horst Eylmann (CDU/CSU) claimed that this was the second attempt to work through the remains of an *'Unrechtsregime'* and that for the second time, Germany struggled to do so while also serving basic principles of justice.

---

[331] 'Es steht außer Streit, daß bei jeder Entscheidung, wie schwer der Vorwurf auch sein mag, die Würde des Menschen nicht verletzt werden darf. Es steht ferner außer Streit… daß in Gerichtsverfahren nicht hineinregiert werden darf. Es sollte aber auch außer Streit stehen, daß in einem Fall wie diesem – und Recht wird im Namen des Volkes gesprochen – nachhaltig überdacht werden sollte, wie für den Normalbürger nachvollziehbarer und verständlicher geurteilt werden kann. Das geht uns alle an.', ibid.

[332] ibid, pp. 11664-66.

[333] ibid., pp. 11668f.

On the one hand, criminal justice was seen as an indispensable part of Germany's attempt to 'overcome' Socialism. On the other hand, its limitations towards achieving this aim (whatever the final state of *Aufarbeitung* might be) were clearly seen. As Horst Eylmann (CDU/CSU) put it sharply: Criminal trials as a measure of transitional justice had to be

> 'necessarily unsatisfactory (…) Not every politically wrong is necessarily also a criminal wrong. On the other hand, criminal injustice does not lose its criminal feature because just because it is also political injustice'.[334]

Jörg van Essen (F.D.P.) uttered his particular frustration at the Honecker trials' ending. In his view, this had renewed the 'old' debate if small men be hanged and big men be let go. Self-critically, he asked that 'we (…) contribute to making the prosecution of small men ever moreperfect , while one of the key players enjoys the beautiful Chilean summer?'[335] Though generally supporting the draft bill, he also demanded that they develop an international criminal law with limitation periods which permitted retroactive criminal *Aufarbeitung*.

Once again, it was Uwe-Jens Heuer's task to formulate fundamental opposition to the project. His constitutional doubts culminated in the claim that the draft bill amounted to perversion of justice – the very same reproach made against the GDR, as he exclaimed. He fought a political line of defence: as a five digit figure of cases was to be expected, legal peace could not be achieved within the next half decade. In his eyes, this supported right-wing extremism, as the perpetual discreditation of Socialism deprived people of their past.[336]

It was clear that this law was a very political project. As Wolfgang Ullmann (Bündnis '90/Die Grünen) emphasised: This was a 'fundamental question' that

---

[334] 'notwendigerweise unbefriedigend… [Nicht alles] politisch[e] Unrecht [ist] notwendigerweise auch kriminelles Unrecht. Allerdings verliert andererseits kriminelles Unrecht diese Eigenschaft nicht, weil es auch politisches Unrecht ist.', ibid.

[335] 'Tragen wir durch dieses Gesetz nicht dazu bei, die Verfolgung der Kleinen juristisch noch perfekter zu gestalten, während einer der Hauptakteure den schönen chilenischen Sommer genießt?', ibid., p. 11667.

[336] ibid., pp. 11667f.

successfully had been 'handled and decided in democratic discourse'.[337] The final vote was predictable: CDU/CSU, F.D.P., SPD and Bündnis '90/Die Grünen supported the bill, PDS abstained.[338] After Bundesrat had given its final approval,[339] the first Limitation Periods Act (1. Verjährungsgesetz) came into force in spring 1993, only a few months after Honecker had been released from prison (see chapter 4).[340]

Extending Limitation Periods: the second Bill

Other than the first Bill on Limitation Periods, the second draft bill which aimed at extending limitation periods, was more contested. Its aim was to extend limitation periods beyond the usual point in time where the acts had lapsed. The more controversial legislative process suggests that there was inarticulate, yet substantial, opposition to the legislation; a 'silent majority' might indeed have disfavoured the very idea of extending limitation periods.

Following Bremen's proposals (Bremen was at the time governed by a coalition government of SPD, Bündnis '90/Die Grünen and F.D.P., a so-called *Ampelkoalition),* the Bundesrat's leading justice committee postponed the matter repeatedly for more than one year. This was always done by the majority of SPD-led and left-leaning state governments against the votes of the conservative-led governments of Baden-Württemberg, Mecklenburg-Vorpommern, Sachsen-Anhalt and Schleswig-Holstein; Thüringen repeatedly abstained. Looking at East German states, it is striking that only Brandenburg (*Ampelkoalition*) and Berlin agreed to postpone the matter, that is, if one counts Berlin as an East German state.[341] A

[337] 'fundamentale Frage'; 'im demokratischen Diskurs behandelt und entschieden'; ibid., p. 11664.
[338] Deutscher Bundestag, 12. Wahlperiode, 'Amtliches Protokoll der 134. Sitzung', 21 January 1993, PA-DBT 4000 XII/187 Bd. A lfd. No. 30; Gesetzesbeschluß des Deutschen Bundestages: Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten, BR-Drs. 50/93, 22 January 1993.
[339] Beschluß des Bundesrates zum Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten, Drs. 50/93, 12 February 1993, PA-DBT 4000 XII/187 Bd. A lfd. No. 35
[340] Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten (VerjährungsG) vom 26. März 1993, Bgbl. 1993 I, p. 392.
[341] PA-DBT 4000 XII/245 Bd. A lfd. No. 11.

similar picture existed in the committee for home affairs, where only Mecklenburg-Vorpommern insisted on the questions urgency, whereas a majority, be it erroneously or deliberately, saw no urgent need for action, as once again Bremen's representative made clear.[342]

This debate – or rather the non-debate – continued up until May 1993, that is, to a point in time where the lapse of time for 'minor' crimes was only five months away. Now, Sachsen introduced a new proposal [343] and Mecklenburg-Vorpommern's new Justice Minister, Herbert Helmrich, used this opportunity to once again underline the urgency and necessity of legislative action. In his words, 'the liberal-democratic constitutional state' had to keep its promises. [344] He consequently rejected all attempts to de-politicise or to legalise the question of limitation and to accept it as a normal judicial process. Assuming this would misconceive the unique position of Germany's *Neue Bundesländer.* Victims of government criminality – in their longing for justice – could not be expected to bear the consequences of government inaction .[345]

Rolf Krumsiek, Justice Minister of Nordrhein-Westfalen and already a prominent actor in the SPD's quest to dissolve the *ZESt* during the 1980s now became the first Social Democrat to contradict the concern. Although showing basic appreciation for the general intention, he argued that it was not the right time to make a decision in this question. (This once again reminds the reader of the notorious strategies of postponement and inaction displayed by the BBC's famous permanent under-secretary of state in *Yes, Minister,* Sir Humphrey Appleby.) He lobbied for the – legally unrealistic – idea of initiating proceedings in all cases. According to the law, this would have interrupted the count of the limitation period,

[342] ibid., no. 4.
[343] BR-Drs. 319/93 (Grunddrs. 147/92), 6 May 1993, ibid., no. 13.
[344] Der 'freiheitlich-demokratische Rechtsstaat [steht] im Wort.', ibid. no. 14, pp. 159-61.
[345] ibid.

thereby beginning anew.[346] Naturally, this argument overlooked that East Germany's authorities could hardly have managed to initiate proceedings in a noteworthy number of cases between May and September 1993; law enforcement authorities were still enervated by mass exchange of elites and a change of many legal documents, and summer vacation time was imminent. Moreover, it was widely expected that many bagatelles would only surface through individuals studying their Stasi files at the BStU and subsequently filing a criminal complaint. Still, Krumsiek argued that, if such an initiation of proceedings as a means to extend limitation periods could not be managed, the lapse of time should be accepted, in accordance with the 'basic ideas of the *Rechtsinstitut'*.[347] Even though hidden in intertwined language, this was a clear case for letting bygones be bygones – a political position originally known from conservatives in the battles of 'mastering' the Nazi past. For Krumsiek, this lapse of time would have had even some desirable consequences: In the future, prosecuting 'small offenders'*'* would no longer bind legal resources. Hence, prosecution of those actually responsible for GDR regime could be accelerated. Moreover, Krumsiek identified the positive aspect that East Germany's judiciary would no longer neglect to combat current crime, especially such gang delinquency that had been imported from the West, as Krumsiek said.[348] Krumsiek did not go as far as mentioning the notorious 'final stroke' that was well-known from debates on the overcoming Nazism. But his remarks nonetheless reflected the same confrontation of *Aufarbeitung* and mastering current problems. Eventually, this reading ended without a conclusive vote; rather, the majority favoured continued committee deliberations.

---

[346] According to § 78c (1) StGB, the limitation period is suspended upon a defendants first interrogation, when search warrants or arrest warrents have been issued, or when the main proceedings are being opened. However, the lapse of time inevitably occurs after a time twice as long as the origional limitation period has passed. This is called '*absolute Verjährung'.*

[347] '… wird es entsprechend dem Grundgedanken des Rechtsinstituts der Verjährung meines Erachtens dabei auch sein Bewenden haben dürfen.', PA-DBT 4000 XII/245 Bd. A lfd. No. 14, pp. 159-61.

[348] ibid., Appendix 1/6, pp. 189f.

However, the proponents of extended limitation were resolved not to drop the matter. Behind the scenes, the representatives of Mecklenburg-Vorpommern, Sachsen-Anhalt and Sachsen agreed on a new draft bill; those East German states with a CDU-led government pressed the issue further.[349] In the committee for legal affairs, SPD-led Bremen, Niedersachsen and Nordrhein-Westfalen once again voted for repeated deferment on 2 July 1993, probably knowing that, owing to parliament's summer recess, this would have meant the end for the project, as getting legislation through before the lapse of those minor crimes on 3 October 1993 would become ever harder and more unlikely.[350] However, this time, the three states failed, as all other SPD-led governments, perhaps yielding to increasing public pressure, joined the conservative side of the Bundesrat in voting to take the legislative project to the next stage.[351] This time, this even included Berlin, which was governed by a startlingly silent Grand Coalition under Eberhard Diepgen (CDU), which was responsible for the lion's share of criminal cases. The draft bill that was finally approved by the committee for legal affairs stated that, according to West Germany's StGB, murder would no longer lapse; moreover, medium-heavy crimes (such as fraud or violent assualt) should have lapsed eight years after the legislation came into force. Minor crimes, whose speedy expiration had been the original impulse for the whole legislation, now disappeared from the document and hence would have lapsed a few weeks later.[352]

The Bundesrat's debate on the floor was unemotional. Herbert Helmrich (CDU, Mecklenburg-Vorpommern) was the only speaker; other 'speakers' had their speeches recorded. Again, at least the original intention was widely welcomed and

[349] ibid., no. 15 and 16.
[350] ibid., no. 16.
[351] Wingenfeld, Debatte, 70-72.
[352] PA-DBT 4000 XII/245 Bd. A lfd. No. 16, BR-Drs. 319/1/93, ibid., no. 17.

the draft bill was approved and sent to the Bundestag for further legislative procedures.[353]

Bundestag deliberations on the second draft bill

Bundestag reconvened only some eight weeks later, in early September 1993; only three and a half weeks before the crucial date of 3 October. Here, the issue received a more passionate debate and broad support. In the meantime, two alternative proposed bills had been drafted within the Bundestag. CDU/CSU, F.D.P. (the government parties) and SPD joined forces to introduce a joint draft, proposing an extension of limitation periods by c. two and a quarter years. [354] The draft bill of Bündnis 90/Die Grünen went further in suggesting an extension by four and a quarter years. However, it was also narrower in excluding so-called '*Vereinigungskriminalität'*, as only deeds committed during the time of the existence of the GDR were included. Economic crimes committed during the turbulent months following reunification would have remained subject to shorter limitation periods.[355] The abolition of limitation periods on murder, however, was beyond dispute. As parliamentarians were running out of time, all proposals were directly sent on to Bundestag's committee on legal affairs, whose subsequent report back to the plenum was crucial for future progress of the legislation.[356]

In Bundestag's leading committee, legal affairs, the general necessity of extending limitation periods and ensuring the possibility for future trials was hardly contested. Still, the committee subjected all three drafts a detailed scrutiny. Horst Eylmann (CDU), who was the committee's commentator (*Berichterstatter*) on the

[353] ibid., No. 19, pp. 324f. In *Bundestag,* this was recorded as Drs. 12/5613, 3 September 1993, cf. PA-DBT 4000 XII/245 Bd. A lfd. No. 20 und No. 21.
[354] DBT-Drs. 12/5637, 07 September 1993, PA-DBT 4000 XII/245 Bd. A lfd. No. 22.
[355] ibid., no. 23.
[356] 'Amtliches Protokoll der 173. Sitzung des Deutschen Bundestages', 9 September 1993, PA-DBT 4000 XII/245 Bd. A lfd. No. 25.

affair, identified several severe judicial and linguistic mistakes or ambiguities. Eventually, the Federal Ministry of Justice tabled a '*Formulierungshilfe*', which happened to already have been cleared with all state governments. (It remains unclear why the government only provided such a document instead of a draft bill.)[357]

This *Formulierungshilfe* helped to avoid unintended conse-quences by through linguistic and legal precision. Now, other than the Bundesrat's draft, but in agreement with the Bundestag's parties drafts, this proposal once again included bagatelles. It was suggested that they could lapse lapse no earlier than 31 December 1995, while medium-heady crimes could not lapse before the end of 1997.[358] Surely, to re-introduce the extension for 'minor' crimes was also a reaction to interventions made by East German representatives, for example Bündnis '90/Die Grünen's parliamentary group in Mecklenburg-Vorpommern's state parliament, but also by all *Länderbeauftragten für die Stasi-Unterlagen,* or the *Bund der Stalinistisch Verfolgten in Deutschland e.V.*[359]

The BMJ's intervention was unusual: unorthodox in its form, and unprecedented in its resolution to support the extension of limitation periods, as the government had remained rather inactive in previous years and months. But be this as it may, the BMJ's intervention was widely welcomed by the committee. Almost all members signalled their support for the bill. Only Wolfgang Freiherr von Stetten (CDU), born in Sachsen, but socialised in Baden-Württemberg made clear that bagatelles should have been excluded from the draft. The PDS (the SED's legal and institutional successor party) had Uwe-Jens Heuer speak for them. Other than in the subsequent plenary debate, he remained rather tame, only welcoming that the

[357] For the '*Formulierungshilfe'* (formulation aid or draft), which was not a *Drucksache* in its own right, see the appendix to the Legal Committee's 87th session on 15 September, PA-DBT 4000 XII/245 Bd. A lfd. No. 29, pp. 13f.
[358] ibid., no. 29.
[359] ibid., no. 40-42.

BMJ's proposal was less sweeping than the Greens' draft had been.[360] The BMJ's proposal sailed through the committees's vote with only two nays. Now the Bundestag's floor was called upon to take the final decision.[361]

Oddly enough, given the relevance of criminal proceedings in Germany's post-socialist transitional justice, 23 September 1993 marked the Bundestag's first plenary debate on the extension of limitation periods (as opposed to the assertion that crimes had not lapsed until 1990, as provided by the first bill) – and one of only few occasions were criminal trials as transitional measures were debated in a broader sense. Taken together with the deliberations on the first Limitation Periods Act in spring 1993, these parliamentary readings mark on of the places, where political accountability and legislative legitimacy of criminal trials as transformative measure can be identified, as these debates went beyond discussing the narrow content of the proposed legislation and rather also contemplated purpose, means, and limits of judicial forms of transitional justice.

The debate was held with earnest and reflected a broad consensus; only the PDS's Uwe-Jens Heuer, still tame during the committee stages, catered for some controversy. This second and third (and hence final) reading of the draft bill oscillated between various argumentative levels and can fairly be characterised as a comprehensive and successful debate on the potentials and limits of judicial *Aufarbeitung* and the preconditions for reconciliation.[362]

Naturally and inevitably, different intellectual and argumentative dimensions blended during the debate. On the legal level, it was feared that extending limitation periods might violate principles of the rule of law. Even though, legally speaking, extending limitation periods did not violate the constitutions prohibition of

[360] ibid., no. 29.
[361] ibid., no. 30.
[362] For quotes in this section, see 'Stenographischer Bericht der 176. Sitzung des Deutschen Bundestages', 12. Wahlperiode, 23 September 1993, PA-DBT 3001, p. 15131-46.

retroactive punishment (Art. 103 (2) GG), this concern pointed to questions of political legitimacy and the purpose of judicial *Aufarbeitung* after transformation to democracy, beyond a purel legalistic dimension.

However, most speakers saw a fundamental injustice in the threatening lapse of crimes committed by the Stasi, including the prosecution of those 'minor' crimes which was now at stake. For instance, MP Dirk Hansen, and the Federal Minister of Justice, Leutheusser-Schnarrenberger (both F.D.P.) felt that such crimes could not lapse, as otherwise disappointment in the *Rechtstaat* would be fuelled and nourished even further.

Like in the immediate post-war period, the figure of a 'final stroke'[363] played an important role for contemporaries. Mecklenburg-Vorpommern's Minister-präsident, Bernd Seite, who made use of his privilege to also address the Bundestag, pointed to an INFAS opinion poll of August 1993 in which fifty-one per cent of East Germans demanded a final stroke. Seite and also Hans-Joachim Hacker (SPD, Mecklenburg-Vorpommern) rejected this notion. A final stroke, Seite argued, meant failing to master an enormous 'societal challenge', as well as failing the victims' interests. By no means would this mean that all *Vergangenheitsaufarbeitung* would be left to criminal justice; this could only be *part* of it:

> 'The social debate about the causes, the extent and the effects of injustice in the GDR must be continued in a variety of ways in the interest of the democratic, constitutional future of our people.'[364]

[363] 'Schlussstrich'

[364] 'Die gesellschaftliche Auseinandersetzung über Ursachen, über den Umfang und die Auswirkungen von Unrecht in der DDR muß im Interesse der demokratischen, rechts-staatlichen Zukunft unseres Volkes in vielfältiger Form weiterbetrieben werden.'

In Seite's view, this included that victims of government crimes could not only *identify* former wrongdoers upon studying their Stasi files, but also bring them to justice.

Again pointing to the BStU's work, Angelika Barbe also believed that the extent of regime crimes would only gradually come to be known. Only then would prosecution of the old elites become possible. She rejected any claims of such trials amounting to pure revenge, as rather lenient penalties suggested the very opposite.

For Rolf Schwanitz, an East German Social Democrat, granting the victims the opportunity to decide whether or not to file charges was paramount. In his view, former elites had been all too successful in assuming attractive posts in the economy or civil service after reunification; at the same time, GDR victims would only insufficiently be recognised and acknowledged.[365] Therefore, any calls for amnesties were inappropriate, and rules regarding judicial rehabilitation of victims of perversion of justice would be inadequate. Hence, reinstating former victims with agency would be important.

Comparisons to West Germany's criminal prosecution of former Nazis became a key resource of legitimacy, even though speakers were careful not to equate the two dictatorships with respect to their gravity or cruelness. Horst Eylmann (CDU), for example, believed that allowing crimes to lapse would be a highly problematic privilege for political perpetrators, especially in a country that 'had been afflicted by a dictatorship twice within a lifetime'.[366] Too easy-going an approach, Eylmann warned and pointed to the slow prosecution of Nazi perpetrators, could bring about unwished and unintended consequences. Likewise, Bernd Seite with a warning tone referred to insufficient ways of *Aufarbeitung* of the NS-Regime. Dirk Hansen (F.D.P.) also relied on the comparison between *Aufarbeitung* of the Nazi regime

[365] Kowalczuk, Übernahme, 170-92.
[366] 'zweimal innerhalb eines Menschenalters von einer Diktatur heimgesucht worden ist.'

and the GDR in order to justify continued criminal prosecution of GDR perpetrators. Like many speakers, he was careful to differentiate between both dictatorships, and stressed the importance of criminal prosecution in a country in which two 'dictatorships, [though] highly incomparable in their objectives and foundations, twice had the chance to torture, persecute, imprison and kill people in a totalitarian manner'.[367]

A key question negotiated in this debate was how criminal trials would be related to other measures of transitional justice, that is, how significant their role should be in comparison to other means, and how these could be related to central aspects such as reconciliation or justice. Almost all speakers emphasised that criminal trials would indeed be an important, but not sufficient means of *Aufarbeitung,* let alone an anti-totalitarian prevention. Rather, they were always placed in the context of more comprehensive social processes. Again, Bernd Seite stressed that many forms of political injustice were judicially elusive. Many people, more than just formal regime perpetrators, had contributed to an 'atmosphere of fear', without their actions being litigable. Hence, *Aufarbeitung* would have to include political, historical and academic measures; all in order to prevent any 'romanticisation' of the GDR. However, only the criminal law could 'atone for guilt and do justice to the victims'. Horst Eylmann (CDU) believed he heard calls with soaring volume demanding an end to criminal trials and urging to let 'reconciliation have priority over vengeance'. He referred to an editorial by *Die Zeit*'s publisher Marion Dönhoff who had described as an act of wisdom Poland's decision to close the secret service's files immediately after the fall of Socialism in 1989. In a rhetorical question, Eylmann asked whether, following this logic, the BStU should be

[367] '(…) Diktaturen, die in Zielsetzung und Grundlagen höchst unvergleichlich waren, in Deutschland zweimal die Chance hatten, in totalitärer Manier die Menschen zu quälen, zu verfolgen, einzusperren und zu Tode zu bringen'.

dissolved and also the '*Salzgitterakten'* (the files of the *ZESt*) and the files of the Reichssicherheitshauptamt (a key institution in the organisation of the Shoah) should be sealed?

For Bündnis 90/Die Grünen, Wolfgang Ullmann also rejected the contrasting juxtaposition of truth and reconciliation. Achieving reconciliation without truth was impossible, as he claimed that 'reconciliation without truth, that should be a bleak reconciliation'.[368] Dirk Hansen (F.D.P.) added, that criminal prosecution was without alternative; victims could only forgive their wrongdoers if and when they knew what there was to forgive. He also reminded his audience that so-called bagatelles often really were violations of basic and human rights.

> 'We want to be able to go beyond shock and distress on the way to enlightenment, and moral and judicial rehabilitation. We do not want to repress and cover up, but to preserve the possibility of reconciliation by way of knowledge and truth (…)'[369]

Likewise, Bernd Seite stressed that 'justice' and elucidation would be necessary preconditions for reconciliation and a common future.

Of course, grand questions of guilt and complicity, of consent and coercion were touched upon. Arguments for a reconciliatory approach were seen as a 'mashing up perpetrators and victims', as Horstl Eylmann put it.[370] He believed it aimed at making all responsibilities forgotten:

> 'Dictatorships, regardless of their provenance, do not come over a country like hailstorms, they are made by people, and they are also maintained by people. There is no reason to reward those who, in a dictatorship, have not even respected their own

[368] 'Versöhnung ohne Wahrheit, daß müsste eine trostlose Versöhnung sein.'
[369] 'Wir wollen über Erschütterung und Betroffenheit hinaus den Weg zu Aufklärung und moralischer wie justiziabler Rehabilitation weitergehen können. Wir wollen nicht verdrängen und zudeckeln, sondern überhaupt die Möglichkeit der Versöhnung auf dem Wege der Erkenntnis und Wahrheit oder wohl doch besser von Wirklichkeit bewahren.'
[370] 'Täter-Opfer-Brei'

> criminal laws and committed crimes with a disguised amnesty – that is what letting the crimes lapse would amount to.'[371]

However, he strongly refused to see that this would be a collective punishment for all East Germans. A majority of those had not become criminal, but had arranged themselves with the regime, '… as West Germans had done no different.' For most people, in fact, it had been possible *not* to become criminal. Those majority of East Germans were not at the centre of the proposed legislation, Eylmann believed. He saw it as a 'commandment of political wisdom' and as a sign of solidarity, to reach out to those people and to give them an opportunity to take part in the community.[372] Hence, the bill would not seek 'vengeance', but 'justice'.[373] Likewise, Bernd Seite rejected totar perpetrators and victims with the same brush: 'Not all of us Germans in the GDR were SED party members; by far not all party members have become guilty. Therefore, it is all the more important not to lump the real perpetrators with the victims.'

Only Uwe-Jens Heuer (PDS) dared to step out of line of this broad and pan-partisan consensus. In the GDR, Heuer had had a remarkable administrative career. Now, he described the Border Guard Trials as political trials, aiming only at supporting the argument that GDR had been an *'Unrechtsstaat'*. Like Trittin, Heuer relied on a rabulist rhetoric when asking what crime Markus Wolf had committed. In the GDR, Wolf was head of the Stasi's foreign secret service, HVA. Heuer asked whether Wolf could not have legitimately been head of a secret service. With an equalisation of West German secret services with the Stasi, Heuer tried to downplay

---

[371] 'Diktaturen, gleich welcher Provenienz, kommen nicht wie Hagelschauer über ein Land, sie werden von Menschen gemacht, und sie werden auch von Menschen aufrechterhalten. Es gibt keinen Grund, diejenigen, die in einer Diktatur noch nicht einmal die eigenen Strafgesetze respektiert und Delikte begangen haben, mit einer verkappten Amnestie – das wäre nämlich das Verjährenlassen – zu belohnen.'

[372] 'Gebot der politischen Klugheit'.

[373] 'Vergeltungssucht', 'Gerechtigkeit'.

the quality and extent of GDR state crimes: pointing to acts of 'subversion'[374] and espionage in the Stalinist days of the GDR, he claimed it would be incomprehensible why today's courts should have to deal with opened letters or insults of the 1950s – he did not mention the suffering of political prisoners, of victims at the Wall and border or of their survivors. He believed the purpose of criminal trials and of extending limitation periods was to humiliate and unsettle thousands of East Germans in order to destroy their 'fighting spirit'[375] and to compromise advocates of reconciliation and amnesty. But Heuer's provocations failed to ignite uproar in Bundestag. Eventually, an overwhelmingly large majority of CDU/CSU, SPD, FDP and Bündnis 90/Die Grünen approved the bill, with only the PDS/Linke Liste rejecting the proposal.[376] The only exception to this rule was the CDU's Wolfgang von Stetten who, in a written statement, stressed that a full amnesty in 1990 would have been the right approach.[377]

Now, the Bundesrat was called upon to deliver a final vote.[378] The Second Chamber's committee for legal affairs convened on the same day and, after mentioning the differences between the Bundesrat's own draft bill and the Bundestag's passed bill, the committees' majority approved the bill to go to the floor. However, once again, the Social Democratic governments of Brandenburg, Bremen, Saarland und Schleswig-Holstein voted against the bill.[379] On the floor, the matter was debated quickly. No one requested to give a speech, and so the Bundesrat finally approved the Bundestag's draft bill, which could now soon come into force.[380] However, three speeches were recorded in written form. Herbert

[374] 'Zersetzung'.
[375] 'Kampeswille'.
[376] ibid., p. 15236. Cf. PA-DBT 4000 XII/245 Bd. A lfd. No. 32.
[377] 'Stenographischer Bericht der 176. Sitzung des Deutschen Bundestages', 12. Wahlperiode, 23 September 1993, PA-DBT 3001, p. 15237.
[378] BR-Drs. 659/93, PA-DBT 4000 XII/245 Bd. A lfd. No. 33.
[379] ibid., A lfd. No. 34-35.
[380] ibid., Nr . 35.

Helmrich (AMT Mecklenburg-Vorpommern, CDU) welcomed the outcome. Hans-Otto Bräutigam (Brandenburg) criticised that minor offences were now once again included in the law. Hans-Joachim Jentsch, Thüringen's Justice Minister, once again heavily criticised the bill's opponents within SPD and Bündnis 90/Die Grünen for their strategy of delay:

> *'The keyword "Salzgitter" gives rise to the (certainly not only polemical) question whether some wanted to achieve through the lapse of time what they had failed to achieve in their attempts to starve the [ZESt].'*[381]

He also dared to give a prophecy which, as an exception, shall be quoted in German:

> 'Doch bleibt eines richtig: Dem Rechtsstaat, der nicht den Weg der Nürnberger Kriegsverbrecherprozesse gehen will und der nicht die in einer unblutigen Revolution unbefriedigten Rachegefühle nachträglich befrieden kann, sind Grenzen gesetzt. Ich denke zu Recht. Und dennoch wird das Zusammentreffen einer rechtsstaatlichen Ordnung mit der Erbschaft einer Diktatur auch Anlaß sein, diese Grenzen neu zu bestimmen – sie bestätigend oder – was ich eher glaube – neu festsetzend.'[382]

The Bundesrat's vote on 24 September[383] was soon to be followed by executive signatures of the Federal Minister of Justice, Sabine Leutheusser-Schnarrenberger (FDP), by Chancellor Helmut Kohl (CDU) and by Federal President Richard von Weizsäcker. The law was finally proclaimed in Germany's *Bundesgesetzblatt on* 29 September 1993, coming into force the next day.[384]

Summary

The first Limitation Periods Act *(1. Verjährungsgesetz*), in force since spring 1993, put in writing a widely shared legal assumption: the idea that socialist

---

381 *'Das Stichwort 'Salzgitter' gibt Anlaß zu der sicherlich nicht nur polemischen Frage, ob einige über die Verjährung das erreichen wollten, was ihnen durch das Verhindern des Aushungerns der Erfassungsstelle Salzgitter mißlungen war.'*

382 ibid., No. 35.

383 ibid., No. 36 (BR-Drs. 659/93 (Beschluß)).

384 Gesetz zur Verlängerung strafrechtlicher Verjährungsfristen (2. VerjährungsG) vom 27. September 1993, Bgbl. 1993 I p. 1657.

government crimes in the GDR had not begun to lapse until German reunification. This assumption had been derived from West German jurisprudence on large-scale Nazi government crimes. Signed into force in autumn 1993, the *2. Verjährungsgesetz,* was more sweeping, both in extent of deeds which it covered as well as in temporal scope. It extended limitation periods for crimes in the former East until 31 December 1995 for minor crimes (prison sentence up to one year) and until 31 December 1997 for medium-heavy crimes (prison sentence: one year up to five years). For this latter category of crimes, which included forms of fraud, crimes in the former East committed before 31 December 1992 were included. With this measure, legislators aimed at including cases of economic fraud in the immediate aftermath of reunification, so-called *'Transferrubel'* deals.

The political debates and legislative proceedings of both draft bills on limitation periods were strongly intertwined and they have to be understood in each other's context. Yet, their genealogy differed slightly. The legislative project of declaring that the lapse of socialist government crimes had been suspended (1. VerjährungsG) was supported by a broad coalition of political forces. It was initiated by a coalition of conservative-headed state governments from South and East Germany. However, around the same time, the SPD Bundestag group proposed a parliamentary declaration with similar effect: to declare what many jurists believed anyway, namely that limitation periods of socialist government crimes had been suspended during the reign of the SED. This legal understanding was vital for state prosecutors in the 1990s to investigate cases of abuse, murder, espionage etc. which, in many cases, took place years or even decades before. Those crimes would often have lapsed long before. Fundamental opposition to the bill was only uttered by Uwe-Jens Heuer (PDS) in Bundestag. However, at an early stage, a coalition of state governments in Bundesrat managed to water down the draft bill by excluding such cases from the regulation where dual jurisdiction existed, that is, where until 1990, not only East German courts would have been competent, but also West German courts. It remains unclear why those *Länder* pushed for this amendment. In any

case, eventually they failed, as the first act specifically included cases of dual jurisdiction. The only open remark we have from this informal caucus is the somewhat rabulistic address given by Jürgen Trittin in Bundesrat.

But this tacit coalition of left-leaning West German state governments also played a major role in the legislative process for the second act. By contrast to the first act, this project appeared to be more partisan. In Bundesrat, where the second draft bill originated as well, this tacit coalition of objectors delayed the bill for several months by repeatedly postponing to discuss the matter in relevant committees. Reasons for this remain unknown, but it is striking that these were by and large the same state governments which had also tried to bring the *ZESt* to its knees in the late 1980s. By contrast, at an early stage, the bill was pushed especially by right-leaning East German state governments, most of which were represented by Justice Ministers and/or Ministerpräsidenten who personally came from the former East. Once, however, it got through to Bundestag, the draft bill and the idea of extending limitation periods found strong support also among the SPD and Bündnis 90/Die Grünen. Increasing public pressure might account for some of this, but it also seems fair to assume that the presence of former GDR civil rights activists among the ranks of SPD and Bündnis 90/Die Grünen might have convinced their comrades from the West that seeking justice was not a reactionary programme, but, perhaps, shared by East Germans.

Of course, both legislative ideas were challenged by questions if it was legal – and constitutional – firstly to declare that limitation periods had been suspended and, secondly to legislate that they would even be extended. Hence, for both acts, a series of arguments was brought forward to vindicate the legislative agenda. Politicians as well as legal experts pointed to the Federal Constitutional Court's jurisprudence on the lapse of time of Nazi crimes from the 1950s as an important precedent. These references normally did not amount to an equalisation of the Third Reich and the GDR. Rather, the arguments of the Constitutional Court's judgement were cited: what was the Führer's will ('*Führerwille*') in the Third Reich became

the will of the state and party leadership of SED and GDR in this case. Still, it insinuated a certain degree of comparability between Nazi crimes and GDR crimes which, broadly speaking, can neither be seen as equal or similar in quality or quantity.[385] Hence, this parallel remained a contested argument and was challenged by left-leaning politicians, such as Wolfgang Ullmann (Bündnis 90/Die Grünen) or Uwe-Jens Heuer (PDS). Over the course of time, it seems that also conservative politicians became increasingly aware of the importance of sensitivity on this issue and weighed their words with an increasing degree of caution, without abandoning the argument altogether.[386] A specific version of this vindicative comparison were references to the 'failed' criminal prosecution of former Nazis – a form of *Aufarbeitung* which was seen as all to lax and myopic. This history of sweeping the past under the carpet was used as an apotreptic *exemplum:* re-united Germany should not make the same mistake again.

Solely Wolfgang Ullmann and Bündnis 90/Die Grünen*,* despite supporting the overall aim of suspending and extending limitation periods, demonstrated that justifications for criminal trials against GDR officials could be found without drawing any parallels to the Third Reich and its *Bewältigung* in West Germany. They managed to do so by referring to global human rights regimes, notwithstanding that these emerged also out of the ashes of Auschwitz-Birkenau.

Another argumentative resource which was widely deployed was the idea of a legal 'common sense': the idea that a legal situation had to be readily understood by wider public. This was, for instance, reinforced when Hans de With (SPD) reminded his audience that verdicts were handed down 'in the name of the people'. In this claim, also prevalent in current political debates about the extent to which courts should take popular will into account, clashes between the democratic

[385] However, it is important to emphasise that this statement is not meant to relativise individual sufferings under GDR oppression.
[386] On the term 'Totalitarismus', see Vollnhals, Totalitarismusbegriff.

principle and the rule of law became visible which are familiar to modern democracies.[387] This notion was tied to the more general idea that this legislation was necessary because the public expected it. In theory, reference to popular will is, of course, a sign of a functioning democracy. However, it remains unclear whether this reflected a prevalent political sentiment at the time, or merely served as a rhetorical figure. In any case, it brought about a merging of technical-legal considerations with political and normative arguments.

An argument brought forward by all supporting parties was that re-united Germany's courts merely enforced GDR law, as all relevant deeds were also prohibited under the GDR's criminal code. The argument was that due to the will of state and party leaders, crimes had not been prosecuted. Thus, newly induced trials would merely do the job of the GDR's third branch. This marked a very positivist understanding of GDR law, hence a very positivist idea of the functional role of the law in an authoritarian regime. This idea suffered from a series of conceptual and intellectual inconsistencies. For instance, it appears questionable why considerable legislative and judicial efforts should be spent on enforcing the laws of a state which, at the same time, was characterised as an authoritarian regime and an *Unrechtsstaat.* Looking at West German debates between 1961 and 1989, another dogmatic inconsistency is evident. In these twenty-eight years, it was West German legal dogma that most of GDR government crimes were punishable under *West German law.* Now, after the fall of the Wall, the punishability under *East German law* was emphasised and initial West German claims of punishability were

[387] Kielmansegg, Peter Graf: Die Grammatik der Freiheit. Acht Versuche über den demokratischen Verfassungsstaat (= Schriftenreihe der Bundeszentrale für politische Bildung, vol. 1376), Bonn: Bundeszentrale für politische Bildung 2013, pp. 145-180; Ely, John H.: Democracy and Distrust. A Theory of Judicial Review, Cambridge (MA): Harvard University Press [2]1992; Alleweldt, Ralf: *'Die Idee der gerichtlichen Überprüfung von Gesetzen in den Federalist Papers',* in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 56 (1996), pp. 205-39.

played down. These two aspects amplify a perception that any reason available was deployed in order to justify the pursued purpose.

This all reflects that the necessity of judicial *Aufarbeitung* – and *Aufarbeitung* in general – was widely uncontested in Germany's post-reunification political debate. Essentially, almost all political forces seemed to accept the necessity of criminal trials against former GDR officials as unquestionable axiom. The SED's successor party PDS was the only political force which rejected the planned legislation and voiced concerns that a criminal-justice-based approach would entail significant negative consequences for the processes of transition and transformation of East Germany into a functioning democracy, *Rechtsstaat* and market economy. For their speaker, Uwe-Jens Heuer, criminal trials had to be seen in the wider context of transformative experiences. He warned that continued and extended criminal prosecution of GDR officials, if not limited to a few leading individuals, could become yet another strain on a collective East German soul already burdened with economic and social frustrations.

As will be demonstrated in chapter 4, criminal trials were carried out in ordinary regional courts. The occasionally-voiced idea of setting up some form of revolutionary or people's tribunals was not executed. No grand comprehensive debate on transitional justice was held after or during the run-up to German unification. No central political decision was taken to deploy the criminal law in this process. Its use emerged, as argued in chapters 1 and 3, out of a mix of path dependence, conservative ideological hegemony and continuity from initially East-German ways of dealing with former GDR leaders. Hence, on a political and symbolic level, these legislative debates served as a surrogate debate on the concept of criminal prosecution as measure of transitional justice. Both Limitation Periods Acts served as retroactive justification and legitimisation, and the parliamentary proceedings giving birth to those acts can be understood as symbolic and surrogate debates on the use of the criminal law as transitional justice measure. Here, the use

of the criminal law was defended and politically resolved, even though the third branch had initiated the trials already. Despite the claim that those proceedings were inevitable and without alternative, they were not. Naturally, law makers – or negotiators of the TGR – would have been free to prescribe *amnesia,* a grand *forgive and forget.* They did not, and the Limitation Periods Acts with their genealogy are the most visible statement of a widely shared political will, disguised as inevitable factual necessity.

The Border Guard Trials also played into an international development. In their remarks, Wolfgang Ullmann and Jörg van Essen pointed to the deplorable lack of an international criminal law which could have regulated how to handle officials of an authoritarian and abusive regime. The debate on both acts fell into the time immediately preceding and following the installation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Den Haag. This decision, taken by UN-Security Council Resolution No. 827 on 25 May 1993, marked the first step of an institutionalisation of an International Criminal Law after more than forty years of standstill during the time of the Cold War, after the Nuremberg Trials had established some of the basics of International Criminal Law in the late 1940s. Thus, reunited Germany's debates were shaped by international debates, but they also left their imprint on political, diplomatic, academic and legal debates on the subject matter, which provisionally culminated in the establishment of the International Criminal Court (ICC) in The Hague in 1998.[388]

.

Initial fears regarding the legality and especially the constitutionality of both laws could be swept aside during the legislative process. The courts have not dismissed the acts as unconstitutional in subsequent years. The laws effectively targeted all sorts of socialist crimes. This included not only major crimes, such as

[388] On the intersection between debates about German state crimes and the development of international criminal law, see Weinke, Gewalt.

murder or manslaughter, but also seemingly minor crimes such as trespass, invasion of personal privacy or voter fraud. On a large scale, all these deeds had been essential to the running of the GDR's dictatorship and hence it was considered fair and wise to include them.

The inclusion of post-reunification crimes in the extension of limitation periods is but one example of attempts to relate criminal trials to other forms of transitional justice. Including these crimes can be understood as an attempt to counter widespread frustration about the economic downturn of East Germany's economy, soaring unemployment, and alleged cases of fraud and other economic crimes. With this inclusion, legislators tacitly admitted that criminal justice had to be understood in the wider context of transformative practices and experiences which East Germany underwent in the early 1990s. Another example is Michael Luther's reference to the 1. *SED-Unrechtsbereinigungsgesetz,* which aimed at rehabilitating former political prisoners. This law targeted the GDR's victims, while the *Verjährungsgesetze* targeted the perpetrators: legislators understood the wider context of what they were voting on. This link was also implicitly acknowledged by Federal Justice Minister Sabine Leutheusser-Schnarrenberger when she related the people's expectation for trials to be carried out with frustration over missed life chances. But was the ordinary criminal law the right mechanism to address missed life chances? Would not other, more comprehensive forms of revolutionary justice have been more appropriate for acknowledging those far-reaching impacts of the dictatorship?

Aufarbeitung in general and criminal trials in particular were seen as without alternative. Naturally, they were not. Alternative approaches to transitional justice could have included amnesties, partial amnesties for low-ranking officials, extra-legal or extra-ordinary courts and trials etc. However, such alternative approaches were not discussed, except by the PDS. However, given its involvement with former GDR leaders, it is fair to say that the PDS could hardly be seen as a credible agent for reconciliation and forgiveness.

As proxy justification and sanctioning of criminal trials, the laws had a much bigger societal relevance than their legislative content would have allowed for. It marked the point where a re-united country decided to pursue criminal trials as a transformative measure – but this public decision came after trials and investigations had already commenced. As almost all legislators failed to discuss potential other forms transitional justice measures, a lack of alternatives was suggested. This suggestion contributed to a key feature of the trials themselves: that they were a de-centralised form of transitional justice which de-politicised a genuine and fundamental political question: what to do with the legacy of a dictatorship.

3. Criminal Prosecution in the Late GDR, 1989-1990

Calls for Justice

Before the Berlin Wall fell in November 1989, the SED regime had tried everything to to preserve its power, not even shying away from toppling their own leader. On 18 October 1989, Honecker was ousted by the SED's Central Committee *(Zentralkommitee, ZK),* but this could not stop the revolutionary tide in the GDR. [389]

The fall of the Wall marked a stark transition. It made clear that what followed was not just a change of heads, but that a regime change was imminent. Thus, as soon as the old regime had lost its intimidating countenance when the Wall had fallen, demands for criminal prosecution of former leaders were made by citizens. Even a dictatorship of 40 years could not eradicate a sense of what is right and wrong in peoples' minds. Over the years, many citizens of the GDR developed a grudge against their ruling class for enjoying luxuries which most people in East Germany could hardly dream of. This contrast fuelled numerous letters to the GDR's Attorney General and prompted citizens to offer leads to law enforcement authorities in pursuit of corrupt elites.[390]

Remarkable courage was displayed by the teaching staff of a high school in a municipality near Saxony's Czech border. In a letter dated 7 November 1989, that is, two days *before* the fall of the Wall*,* they targeted regime leaders for their apparently widely known luxuries:

> 'We demand criminal prosecution of all those who, in their position and function, obtained unjustified advantages for themselves, who took advantage of the property of the people, who obtained a standard of living more than just different from that of

[389] Rödder, Deutschland, pp. 84-104.
[390] BArch DP 3 / 1290 and DP 3 / 1291.

> the labourers, whose lavishness and prestige is expressed in the personal power of disposal over guesthouses and similar objects, their … corruptness, their taking and giving of "gifts", whose economic crimes can be proved by appropriate investigations.'[391]

Despite their expression of a 'deep concern for our socialist *Heimat'* as an introductory phrase, this was a bold – or potentially socially suicidal – move. Their letter reflected an intense frustration about verbal abuse which they claimed to have endured as representatives of the state. Therefore, they also demanded 'immediate suspension' for all those who had contributed to the 'current misery' by breaking 'state and party discipline', irrespective of their rank or their state and party function.[392] Lastly, the 26 signatories, many of whom were women, took on Egon Krenz. The teachers demanded a public statement from Egon Krenz as leader of the election commission in the local elections in spring 1989, as 'massive allegations'[393] of voter fraud in these elections were already widely known in the autumn of 1989. In early November 1989, Krenz had just been promoted to Secretary-General of the SED and *Staatsratsvorsitzender,* that is, *de facto* head of state and government of the GDR. Their direct criticism of the leadership reflects that in early November 1989, the regime could no longer control public outrage about cases of corruption and inappropriate luxuries of elites.[394] Given the comprehensive allegations against former state leaders, the signatories showed significant trust in the work of their country's judiciary's independence, remarkably

---

[391] 'Wir fordern die strafrechtliche Verfolgung der Vergehen all derjenigen, die sich in ihrer Stellung und Funktion ungerechtfertigte Vorteile verschafften, die sich am Vermögen des Volkes vergriffen, die sich einen Lebensstandard ergaunerten, der sich von dem der Werktätigen mehr als nur unterscheidet, deren Prunk- und Renommiersucht in der persönlichen Verfügungsgewalt über Gästehäuser und ähnliche Objekte zum Ausdruck kommt, deren … Korrumpiertheit (sic!), deren Nehmen und Geben von "Präsenten", deren Wirtschaftsvergehen durch entsprechende Untersuchungen nachgewiesen werden können.', in: BArch DP 3 / 1290, No. 2. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[392] BArch DP 3 / 1290, No. 2. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[393] 'massive Vorwürfe', BArch DP 3 / 1290, No. 2. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[394] Bock, Systemwechsel, 81-86.

even *before* the fall of the Wall made it clear that the old regime was dead and buried.

Apparently, East German citizens did not see the GDR as that outright *Unrechtsstaat* discussed today. At least initially, they turned to their country's courts to address abuses of power which had long been known to large parts of the wider public, but previously never been subject to judicial review. Arguably, corruption made tangible those benefits which the elites had enjoyed, and made them stand out clearly against material deprivations experienced by large parts of the GDR's population. This form of abuse of power therefore overshadowed other forms of deprivations experienced by East Germans. Moreover, the complaints addressed in this chapter were cast in terms of the GDR's own legal provisions, suggesting a certain remainder of public trust in legal institutions. Lastly, responses by civil servants such as teachers and state prosecutors, who were themselves attacked as a part of the regime and were now keen to distance themselves from it, can be read as a sign of disintegration of the institutional system of the GDR.

Still, we must not be confused: for most of the time, state prosecutors were an integral part of the dictatorship. This was also reinforced by an undated draft order by the National Defence Council (NVR) on state prosecutors' role in a case of defence: According to this draft document, state prosecutors had to fulfil their duties primarily 'in the implementation of decisions of the party of the working class', and only secondarily guided by the constitution and laws.[395]

In another letter to the Attorney General, a person from Dresden denounced top officials for allowing infrastructure and buildings to deteriorate. This piece dates from 9 November 1989 and makes no mention of the fall of the Wall, suggesting it was posted before the writer received notification of that evening's

[395] BArch DP 3 / 1535.

developments.[396] The writer demanded that party and union leaders be charged for deliberate damage to socialist property (§ 163 StGB-DDR), an offence usually more easily punished than offences against private property, despite all socialist ideology and rhetoric.[397]

Numerous letters to the Attorney General reveal a widely shared knowledge – or at least hearsay – of the elites' luxurious lifestyle, like a piece of writing from a citizen in Freiberg (Saxony) demonstrates (for reasons of data protection, the authors' stated names are not mentioned here) This is a notable contrast to letters sent a considerable time before the fall of the Wall, which usually hid their author's identity.[398] On 10 November 1989, hours after the fall of the Wall, the writer drafted (or dated) a letter asking if an alleged luxurious building for Hermann Axen (SED, member of the Politbüro) near the Baltic Sea (and hence at the other end of the country) was correctly funded or if it was 'just another fancy building for state functionaries'[399]. Only days later, a citizens committee from Zepernick, north of Berlin, asked the Attorney General where the money from foreign exchange income had gone to. The revenues belonged 'to the whole people'. Whoever had misappropriated people's property for personal benefit had to be criminally charged, the committee demanded.[400] In a similar manner, in a letter dated 16 November 1989, a lady gave the Attorney General a hint that Siegfried Lorenz, First Secretary of the SED-district leadership in Karl-Marx-Stadt (today: Chemnitz) had a private house built with financial means from the ministry of popular education

[396] BArch DP 3 / 1290, No. 7. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[397] Markovits, Inga: Gerechtigkeit in Lüritz. Eine ostdeutsche Rechtsgeschichte, München: C.H. Beck 2006, pp. 41-62.
[398] Suckut, Siegfried (ed.): Volks Stimmen. 'Ehrlich, aber deutlich ' – Privatbriefe an die DDR-Regierung, München: C.H. Beck 2016, especially pp. 14-24.
[399] 'Superbauten für Staatsfunktionäre', BArch DP 3 / 1290, No. 3. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[400] BArch DP 3 / 1290, No. 4. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)

(*Ministerium für Volksbildung),* which, at the time of the allegations, was headed by Erich Honecker's wife Margot.[401] Without any polemic, the author merely asked the prosecutors to investigate and reply.

But it was not only private persons who used the fall of the Honecker regime to demand investigations. The *Betriebsgewerkschaftsleitung (BGL)* was a post within the federation of the official trade unions, the *Freier Deutscher Gewerkschaftsbund (FDGB).* In each company, factory or institution, one or several persons were elected by union members for administrative help in questions like finding nursery places or booking vacations in union holiday homes.[402] In a letter dated 27 November 1989, the BGL of Berlin's institute for the preservation of monuments *(Institut für Denkmalpflege)* uttered outrage at reports about luxurious lifestyle of 'criminal union leaders' and demanded criminal charges be brought against them.[403]

Numerous further letters were posted to the Attorney General, often by private persons and sometimes by the staff of institutions such as the aforementioned teaching staff or the *BGL*. All of these letters have in common that they appear to be written under a real name; at least nothing suggests the contrary. Moreover, the predominant topic which sparked these letters' outrage was an alleged luxurious lifestyle of (former) leaders of state, party, and unions. The suspicion that this had been realised by misappropriating public finances weighed heavy, especially in a society which claimed more moral purity than capitalist societies, and in a country where public property was labelled people's property. While sometimes writers primarily expressed their frustration, others used their writings to give prosecutors

[401] BArch DP 3 / 1290, No. 6. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[402] Werum, Stefan Paul: *'Freier Deutscher Gewerkschaftsbund (FDGB)',* in: Stephan, Gerd-Rüdiger et al. (eds.): Die Parteien und Organisationen der DDR. Ein Handbuch, Berlin: Karl Dietz 2002, pp. 449-82; Weinert, Rainer/Gilles, Franz-Otto: Der Zusammenbruch des Freien Deutschen Gewerkschaftsbundes (FDGB). Zunehmender Entscheidungsdruck, Institutionalisierte Handlungsschwächung und Zerfall der Hierarchischen Ordnungsstruktur, Opladen/Wiesbaden: Westdeutscher Verlag 1999, pp. 21-31.
[403] BArch DP 3 / 1290, No. 1. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)

specific hints or even formally report an offence, for instance against long-time leader Erich Honecker. Another person who was targeted often was the former leader of the FDGB, Harry Tisch. In almost all letters, writers demanded criminal prosecution for corruption and waste of public money. While most letters were sent *after* the fall of the Wall, *some* were written in the days between Honecker was ousted (on 18 October 1989) and 9 November.[404]

Only few letters went beyond this specific subject area. One letter, dated 14 November 1989, also uttered frustration about how former government politicians had improved their living standards at the expense of citizens, thereby 'violating the constitution' and 'abusing citizens' trust'.[405] The writer went on to claim that therefore, the government was responsible for families leaving the country (via Hungary and Austria) in summer and autumn 1989 and after the fall of the Wall in November of that year. Leaders were responsible for fraud against citizens, for waste of public money, and most notably:

> 'They are guilty of driving many citizens to their deaths because they wanted to escape oppression and paternalism and were shot at the border by the allegedly non-existent firing order.'[406]

This is one of few letters which also included deaths at the Wall (and the notorious 'firing order' which never was found) in its reasoning. However, it was not the borderguards who carried out the shots were charged, but those leaders who allegedly made fugitives flee the country. In an interesting twist, the writer fails to

[404] For many letters, see BArch DP 3 / 1290 and DP 3 / 1291 (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[405] '… die Verfassung verletzt…' ; 'das Vertrauen der Bürger mißbraucht.' BArch DP 3 / 1290, No. 5. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)
[406] 'Sie sind schuldig daran, daß sie viele Bürger in den Tod trieben, weil sie sich der Unterdrückung und Bevormundung entziehen wollten und durch den angeblich nicht existierenden Schießbefehl an der Grenze erschossen wurden' BArch DP 3 / 1290, No. 5. (Specific details of the senders remain anonymous in this study in accordance with regulations of the Bundesarchiv.)

demand *criminal prosecution* as a way to handle former leaders for their alleged wrongdoings, but demands:

> 'Until the machinations of these people have been thoroughly investigated, they should not be allowed...to travel abroad. If they are proven guilty, they should not be granted concessions. Like every average citizen of the GDR, they should receive an appropriate living space and also the pension should correspond to the average citizen, so that they get to feel once what it means to have to earn one's living with the minimum pension.'[407]

So while deaths at the Wall were included in this author's list of government wrongdoings, he suggested a sanction which once again would have been related to experiences of deprivation allegedly shared by many 'average' East Germans.

A final letter shall be presented here which displays one of the widest arrays of accusations against the state leadership. In a letter dated 17 November 1989, its author claims to be writing for an initiative in support of 'anti-Stalinist' and democratic groups in the GDR. S/he accuses former leaders of establishing a dictatorship, of falsifying elections, of violating the 'dignity and freedom of citizens' through violent interventions at demonstrations. Moreover, s/he alleges violations against the right to education, freedom of speech, freedom of association. In their perception, the 'personality and liberty of each citizen of the GDR had been violated' by the border regime and by violations of postal and telecommunications secrecy. Lastly, the *Volkskammer* had only been a fake parliament, as the writer quite accurately claimed.[408] No specific sanction was demanded in this piece of writing.

---

[407] 'Bevor die Machenschaften dieser Leute nicht gründlichst untersucht worden sind, sollten ihnen keine Auslandsreisen…gestattet werden. Bei Nachweis der Schuld, sollten ihnen auch keine Zugeständnisse zugebilligt werden. Sie sollten, wie jeder Durchschnittsbürger der DDR, einen entsprechenden Wohnraum erhalten und auch die Rente sollte dem Durchschnittsbürger entsprechen, damit sie einmal zu spüren bekommen was es heißt, mit der Mindestrente seinen Lebensunterhalt bestreiten zu müssen.' BArch DP 3 / 1290, No. 5.

[408] BArch DP 3 / 1290, No. 8.

Finding the Right Way Forward

If this survey of letters to the Attorney General shows that the population focused mainly on crimes like corruption, the misappropriation of public finances, and a widespread claim for criminal investigations into *this* category of crimes, this emphasis is reinforced in a drafted criminal law reform.[409] The draft penal reform (which was eventually realised after the *Volkskammer* elections of March 1990),[410] was discussed as early as 27 November 1989, that is, less than three weeks after the Wall had fallen. It suggested the introduction of a new paragraph into the penal code effectively penalising wiretapping. Moreover, an amendment for § 219 StGB-DDR was proposed. According to this amendment, crossing the border without a passport was no longer considered a criminal offence. Lastly, the draft reform proposed a paragraph regulating abuse of office and criminalising the destruction of sensitive documents:

> 'Anyone who commits a bodily injury (§ 115), a deprivation of liberty (§ 131), an insult (§ 137), a coercion (129), a threat (§ 130), or a destruction of documents or data relevant to evidence (§§ 241, 241a) in the course of state activities may be punished with a term of imprisonment of up to five years.'[411]

All of this suggests that in late 1989, the penal code was considered an important instrument of managing the ongoing revolution. However, at this time, it seemed paramount to provide legal certainty for cross-border travel and to penalise such abuse of power which the secret service *Stasi* and party leaders had notoriously committed. Another focus was put on the prevention of officials from destroying compromising files, as they were seen as a cornerstone of elucidation of the dictatorship. Since criminal trials seemed institutionally undisputed, it seems fair to assume that for many GDR lawyers, corrupt leaders and secret service had not acted

[409] See BArch DP 1 / 22625.

[410] Bock, Systemwechsel, 306.

[411] 'Wer in Ausübung staatlicher Tätigkeit eine Körperverletzung (§ 115), eine Freiheitsberaubung (§131), eine Beleidigung (§137), eine Nötigung (129), eine Bedrohung (§130), oder eine Vernichtung von Urkunden oder beweiserheblichen Daten (§§ 241, 241a) begeht, kann mit Freiheitsstrafe bis zu fünf Jahren bestraft werden.' § 244a of proposed penal law reform, BArch DP 1 / 22625.

in accordance with but *in violation of* GDR law.[412] Hence, using this law to prosecute them would not pose any form of legal challenge. Prosecution of border guards, however, was once again largely left out in considerations in late 1989.

The same notion can be seen in demands of political actors. During the Peaceful Revolution of 1989/90, *Neues Forum* was one of several political movements whose work led up to the fall of the regime in November 1989, and subsequently part of East Germany's Round Table.[413] Afterwards, *Neues Forum* was one of the oppositionary groups which were part of East Germany's Round Table.[414] In a motion tabled for the Round Table's session on 22 January 1990, *Neues Forum* explicitly demanded criminal investigations against those who had destroyed files as potential means of evidence against Stasi officials and the SED's security branch.[415] In their motion, *Neues Forum* claimed that 'a peaceful and democratic future' of the GDR was 'unthinkable' without a 'truthful disclosure of past and present.'[416] Moreover, the movement demanded that all duties of silence be lifted and that false testimonies be prosecuted consistently.[417] Criminal trials were again seen as an integral part of such a 'truthful disclosure', and such demands were predominantly directed against those who had contributed to citizens' experience of being bullied and of being spied upon.

Another piece pointing into the same direction was a public appeal of *Erfurter Bürgerkommittee.* This was an *ad-hoc* committee composed of opposition

[412] Fahnenscmidt, Funktionäre, 295.
[413] For an overview of the civil rights movement of 1989/90 and information on Neues Forum, see Klein, Thomas: 'Entwicklungsstationen der neuen politischen Vereinigungen in der DDR im Herbst/Winter 1989/90', in: Stephan, Gerd-Rüdiger et al. (eds.): Die Parteien und Organisationen der DDR. Ein Handbuch, Berlin: Karl Dietz 2002, pp. 847-63, esp. pp. 864-57.
[414] Rödder, Deutschland, pp. 178-92.
[415] 'Vorlage des Neuen Forums Vorlage 9/3 zur Sitzung des Runden Tisches am 22.1.1990', in: BArch DP 1 / 22639, No. 1.
[416] 'Die friedliche und demokratische Zukunft unseres Landes ist ohne vollständige und wahrheitsgetreue Offenlegung der Vergangenheit und Gegenwart nicht denkbar', ibid.
[417] ibid.

politicians and dedicated citizens which tried to prevent the destruction of compromising Stasi files by blocking and occupying Stasi offices. Similar movements in other towns can be seen as a non-institutional precursor to the BStU. In an appeal of 9 January 1990, the committee demanded to 'solve' Stasi crimes and to block any special bonuses paid to Stasi officials. Moreover, the Stasi's dissolution was demanded and criminal trials against Stasi staff and members of the SED leadership. Lastly, the group also called for the SED's assets to be disclosed. This appeal was signed by representatives of former block parties CDU, NDPD and LDPD, as well as by opposition parties like SDP and Greens and other groups or citizens' movements like Neues Forum, Demokratischer Aufbruch, Offene Arbeit, and further citizens apparently without any party affiliations.[418]

However, in winter 1989/90, it was far from clear how, if at all, former state and party leaders of Stasi officials would be criminally prosecuted.[419] After all, protecting them against any criminal claims had been an integral part of state practice for decades. Therefore, regional state prosecutors felt the need to urge their superiors to go after former leaders for their alleged acts of corruption. In a letter dated 4 December 1989, the district attorney of *Kreis Glauchau* expressed his 'dismay' at revelations about the leadership's crimes. He also criticised the Attorney General for not investigating these claims thoroughly enough, thereby damaging the credibility of all state prosecutors.[420] In a letter also dated 4 December, the district attorney of *Kreis Aue* expressed their resolution to contribute to an atmosphere of 'openness in our very own work'[421] to protect state prosecutors'reputations . However, the writer also expressed the belief that at that

[418] BArch DP 3 / 1240, No. 11.
[419] Mouralis, epuration, 91-110.
[420] 'Bestürzung', BArch DP 3 / 1240, No. 18.
[421] 'Offenheit in unserer ureigensten Arbeit', BArch DP 3 / 1240, No. 19.

point, the authority still enjoyed significant credibility with the general population, as reflected in numerous petitions and letters.

These letters need to be read with care, as they could also been have written in a spirit of indulging revolutionaries while elegantly sweeping one's one political entanglement under the carpet. Still, they once again reflect that citizens and institutions alike considered the criminal law an effective tool of dealing with former elites, and even a means that was politically untarnished.

Government and opposition politicians, however, knew that the law was far from being 'pure' and free of all political influence. Hence, in its session on 7 and 8 December 1989, the Round Table felt the need to pass a series of resolutions on '*Rechtsstaatlichkeit*':[422] Most importantly for this dissertation, the Round Table determined that '[a]ny person who has committed abuse of authority and corruption shall be held accountable on the basis of the Penal Code in force.'[423] While this may sound like a perfectly obvious and superfluous statement, it demonstrates the perceived necessity that politicians weigh in on *how* to persecute former elites. Apparently, a different behaviour could have been expected from state authorities in the 'old days', if politicians had not reminded them of the legal situation. Therefore, they also stated that: '[t]his means, if necessary, the issuing of warrants of arrest and not the ordering of unlawful house arrests', as was practice with former elites under the SED regime.[424]

An Ambitious Beginning

Those vocal demands for criminal trials were being heard by GDR state prosecutors. By 10 January 1990, merely two months after the fall of the Wall,

[422] 'The rule of law'.
[423] 'Jede Person, die Amtsmißbrauch und Korruption begangen hat, wird auf der Grundlage des geltenden Strafgesetzbuches zur Verantwortung gezogen.', Beschlüsse des Runden Tisches am 7. und 8. Dezember 1989, BArch DP 1 / 22639, No. 3.
[424] 'Dies bedeutet erforderlichenfalls den Erlaß von Haftbefehlen und nicht die Anordnung ungesetzlicher Hausarreste.', ibid.

twenty-two investigative procedures had been launched in the area of responsibility of the military prosecutor's office alone.[425] Of those twenty-two investigations, twelve were directed against senior officers. They were under investigation for allegations such as destruction of documents (§241 StGB-DDR), unauthorised possession of firearms or exploders (§ 206), misdemeanours or fraud to the detriment of socialist property (§ 161, 159), verbal abuse (§ 137), coercion (§ 129), or battery (§ 115).[426]

Ten military leaders were also under investigation in early 1990. The report quotes that former Stasi head, Army-General Erich Mielke was under investigation for abuse of confidence (§ 165).[427] This paragraph[428] punishes abuse of office to the economic detriment of the GDR in severe cases with up to ten years in prison. Other military leaders were also under investigation for allegations such as abuse of confidence (§ 165), destruction of documents (§ 241), and crimes against 'socialist property', i.e. state property (§§ 161a, 162, 165). This group included generals and officers who had had senior positions in the Stasi, in the state's administrative hierarchy (as heads of a *Kreis*- or *Bezirksamt)* and the manager of supplies to the elite's gated community in Wandlitz. Three of those cadres had been taken into custody, including Mielke.[429] Over the coming months, many other leaders became

[425] 'Übersicht der Generalstaatsanwaltschaft der DDR / Militäroberstaatsanwalt, 19 January 1990', BArch DP 3 / 1240, No. 6.
[426] ibid.
[427] ibid.
[428] '§ 165. Vertrauensmißbrauch. Wer die ihm mit einer Vertrauensstellung übertragene Verfügungs- oder Entscheidungsbefugnis mißbraucht, indem er entgegen seinen Rechtspflichten eine Entscheidung oder Maßnahme trifft oder eine gebotene Entscheidung oder Maßnahme unterläßt und dadurch vorsätzlich einer bedeutenden wirtschaftlichen Schaden verursacht, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Verurteilung auf Bewährung oder mit Geldstrafe bestraft. Wer durch die Tat einen besonders schweren wirtschaftlichen Schaden verursacht oder die Tat als Organisator oder als Beteiligter einer Gruppe ausführt, die sich unter Ausnutzung ihrer beruflichen Tätigkeit oder zur wiederholten Begehung zusammengeschlossen hat wird mit Freiheitsstrafe von zwei bis zu zehn Jahren bestraft.'
[429] 'Übersicht der Generalstaatsanwaltschaft der DDR / Militäroberstaatsanwalt, 19 January 1990', BArch DP 3 / 1240, No. 6.

subject of preliminary proceedings for similar claims, but also for alleged voter fraud, like Potsdam's head mayor.[430]

By August 1990, three former leaders had already been charged with abuse of confidence (§ 165) and economic crimes against 'socialist' property, i.e. state property: Harry Tisch, former chair of the FDGB; Werner Krolikowski, member of the *Politbüro* and responsible for economic and currency affairs; and Gerald Götting, who was chair of the GDR's SED-loyal CDU (not to be confused with West Germany's then-ruling party CDU) and deputy of Egon Krenz as head of state and government.[431] Moreover, a series of former leaders were under investigation, predominantly for economic crimes to the detriment of public finances and the country's economy: former head of state Erich Honecker, head of *Stasi* Erich Mielke, SED-secretary for economic affairs Günter Mittag; moreover, former head of government and head of state Willi Stoph, Alexander Schalck-Golodkowski as former leader of the GDR's secret commercial enterprise *Kommerzielle Koordinierung (KoKo),* whose aim was to provide foreign currencies for the GDR; lastly, also Hermann Axen was under investigation, formally a senior foreign policy figure in the SED.[432]

During the eleven months between the fall of the Wall and German reunification, nineteen charges of voter fraud were brought against seventy-sixdefendants. At the same time, twenty-one charges of corruption were brought against twenty-eight defendants. At least forty-two defendants had been temporarily arrested during this time. In the electoral fraud cases, eleven penalty orders were issued and six verdicts were handed down. In these cases, the defendants received suspended prison sentences of four to nine months. In the corruption and abuse of office cases, only one final verdict was handed down (for a prison sentence without suspension),

[430] 'Bericht an den Runden Tisch', DP 3 / 1240, No. 4.
[431] 'Schreiben des Generalstaatsanwalts der DDR, 5. Aug 1990 an Minister der Justiz Kurt Wünsche: Sachstandsbericht über Strafverfahren gegen ehem. Mitglieder der Partei- und Staatsführung', BArch DP 1 / 22640, No. 2.
[432] ibid.

while all other proceedings were being continued after reunification. Altogether, 124 individuals were investigated.[433] It has been pointed out that during these few months of criminal trials *within* the GDR, there was no acquittal and in no case was the opening of the main hearing refused – both things happened regularly in investigations and trials after reunification. This has been seen as an indication, that

> '… despite radical changes in legal practice, the legal situation appeared clear and the legal conditions for punishment were not questioned. The change in the handling of the law therefore gave no reason to discuss the prohibition of retroactivity also applicable in GDR criminal law'.[434]

Experts have therefore hailed the GDR's judicial branch for their 'remarkable' quantities of completion, especially in the light of strained staff resources, and described state prosecutors and judges as 'an important pillar and driver of the GDR's peaceful revolution'.[435]

Beyond criminal trials

However, calls for criminal prosecution as a way to secure justice were by no means the only aspect of revolutionary or transitional justice *avant la lettre* (A. Weinke)[436] during those months in late 1989 and early 1990. Perhaps even more important was to secure the progress of the revolution and to protect it from counter-revolutionary forces of the old regime. Hence, calls to dissolve the former regime's central institutions became louder. For the Round Table's session on 15 January 1990, *Demokratischer Aufbruch*[437] tabled a motion demanding the dissolution of

---

[433] Marxen/Werle/Schäfter, Strafverfolgung, 11-14.

[434] '… trotz radikaler Änderung der Rechtspraxis die Rechtslage klar erschien und die rechtlichen Voraussetzungen für eine Bestrafung nicht angezweifelt wurden. Der Wandel in der Handhabung des Rechts gab demnach keinen Anlass, das auch im DDR-Strafrecht geltende Rückwirkungsverbot zu erörtern.' ibid.

[435] Fahnenschmidt, Funktionäre, 293.

[436] Weinke, Transitional Justice.

[437] For more information, see Klein, Thomas: 'Entwicklungsstationen der neuen politischen Vereinigungen in der DDR im Herbst/Winter 1989/90', in: Stephan, Gerd-Rüdiger et al. (eds.): Die Parteien und Organisationen der DDR. Ein Handbuch, Berlin: Karl Dietz 2002, pp. 847-63, esp. pp. 847-51.

the SED, the Stasi – or as it had been renamed in November 1989, the *Amt für Nationale Sicherheit (AfNS).*[438] For the same session of the Round Table, *Neues Forum* demanded that all security organs as well as the SED be declared unconstitutional.[439] In line with citizens' committees like the one in Erfurt (see above), both movements called for the Stasi files to be opened to the public – a claim later accommodated by the establishment of the BStU. Symbolic, pragmatic and discursive indictments oft he old regime flanked and facilitated legal ones.[440]

These movements clearly supported and often demanded criminal prosecution of former leaders. But they also showed sensitivity for the wider necessities of a transitional process, including the very basic need to protect an ongoing revolution by dismantling institutional opponents. This is reflected in a Round Table report of early January 1990, which pressed politicians to continue to dissolve the Defence Ministry and to request the National People's Army (NVA) to surrender their weapons.[441]

A Menace to the Revolution

The greatest menace to the revolution's success and progress, however, was the GDR's grave economic situation. Even before the fall of the Wall, the economic situation was dire. The state was all but bankrupt: its economy lagged way behind West European competition and the currency was so weak that it was difficult to import raw materials. This economic slump was further catalysed when hundreds of thousands started to leave the country once it had become safe to do so in November 1989.

This was also understood by those in charge. Hence, many motions tabled at the Round Table dealt with the country's economic crisis. In the aforementioned

[438] BArch DP 3 / 1240, No. 10.
[439] 'verfassungsfeindlich'. BArch DP 3 / 1240, No. 8.
[440] Goldbeck, Vergangenheit; Elster, Closing.
[441] BArch DP 3 / 1240, No. 2.

Round Table report of early 1990 , a dire picture of the GDR's economic situation was painted. Members of the Round Table were informed that not only were the economy, the protection of jobs, increasing efficiency, and environmental protection important issues but also,more dramatically, the report discussed how sufficient energy and food supply could be ensured throughout winter 1989/90.[442]

In another undated report for the Round Table, supposedly from early 1990, it was stated that some 29,000 people had already been lain off by the Ministry of National Defense, with another 22,500 people being sent into integration measures (at a total of approximately 85,500 staff).[443] The Green party understood that a revolutionary process and the new state which was about to be born needed to handle this economic transformation with great care. Hence, they demanded to integrate those who had lost their jobs since November 1989, as otherwise they might turn into a radicalised group of counter-revolutionaries.[444]

Likewise, in a statement before the Round Table on 15 January 1990, head of government Hans Modrow asked three things of Round Table participants: to contribute to all protests remaining peaceful, to contribute to keeping the economy afloat and to influence GDR citizens not to leave the country, as a continued mass exodus would have threatened any prospect of a successful political and economic turnaround.[445]

Summary

In this chapter, we have seen that criminal trials were an integral part of the GDR's Peaceful Revolution and of efforts to manage its aftermath from November 1989 to October 1990. State prosecutors, politicians of the Round Table, and citizens regularly turned to the criminal law in response to revelations about

[442] ibid.
[443] BArch DP 3 / 1240, No. 3.
[444] Press Statement of the GDR's Green Party, 15 January 1990, BArch DP 3 / 1240, No. 9.
[445] BArch DP 3 / 1240, No. 15.

unlawful behaviour of state and party leaders. Remarkably, a few private demands for criminal investigations against former senior leaders were uttered even before the fall of the Wall – a stark illustrations of how the success of civil protests during summer and autumn 1989 emboldened the old regime's critics. Before the evening of 9 November 1989, no one could have foreseen whether the transition of power from Honecker to Krenz in October 1989 had been the regime's last rebellion against its demise or simply a generational change.

However, launching criminal investigations against former state officials was by no means the only priority during the winter months of 1989/90. We have seen that a drafted penal law reform predominantly aimed at providing citizens with legal certainty, especially regarding cross-border travel. Criminal trials as a transformative measure were not discussed during these reform talks. This illustrates that for citizens and officials alike, many acts of 'state crime' such as corruption and voter fraud had violated GDR laws at the time, hence no reformed law was necessary.

Parties and civil rights movements included in the Round Table from December 1989 to March 1990 tabled sweeping demands regarding criminal trials against former state and party leaders. Remarkably, in their demands, they predominantly targeted the former elites' alleged corruption and misappropriation of public funds for private luxuries. However, Round Table participants also voiced demands for other forms of transitional justice, such as opening Stasi archives or the dissolution of SED and Stasi. Those far-reaching calls were mirrored by many letters of private citizens to the GDR's Attorney-General, mostly giving hints in alleged cases of corruption and leaders' inappropriate luxuries. In the light of many citizens' material and immaterial hardships over decades, those economic crimes highlighted the unbridgeable difference between the GDR's official pretense and her miserable reality.

This strong focus on economic crimes was mirrored in the actions of state prosecutors before German reunification.[446] Between November 1989 and October 1990, twenty-one charges of corruption were brought against twenty-eight defendants. This predominantly included charges for the luxurious housing estate in Wandlitz, for concession on rents, and for the designation of specific hunting grounds for the elites.[447] Nineteen charges of voter fraud were brought against seventy-six defendants.[448] In these cases, eleven penalty orders were issued and six verdicts delivered. Only one final verdict was delivered in cases for economic crimes, while all other trials or investigations were continued after reunification. After German reunification, hardly any new investigation in such crimes was launched by re-united Germany's state prosecutors. Thus, it seems fair to assume that GDR state prosecutors decisively shaped the course of criminal justice as a transformative tool. Without their strong emphasis on investigating corruption and abuse of office cases, this category of deeds might have been neglected by post-unification criminal trials. The success of those investigations is further highlighted by the fact that the GDR could probably only deploy between twenty-five and fifty state prosecutors for this complex. Hence, the GDR's initiatives have been praised for their 'remarkable' performance in the light of strained staff resources.[449]

Yet, we must not overlook that various demands for forms of transitional justice other than criminal trials were being uttered. These stretched from opening Stasi files over depriving former elites of their privileges to the dissolution of the SED. However, motions submitted to the Round Table as well as their debates demonstrate that the contemporary meaning of the GDR's economic disruptions can hardly be overestimated. At times, even supply of heat and electricity appeared to be at stake and the government felt the need to appeal to all parties to help prevent further masses from leaving the country. At the same time, the lay-off of hundreds

[446] Fahnenschmidt, Funktionäre, 291-93; Bock, Systemwechsel, 81-86, 102-11, 176-81.
[447] Fahnenschmidt, Funktionäre, 291f.
[448] ibid.; BArch DP 3 / 1240, No. 15.
[449] Schäfter, Strafverfolgung, 13; Fahnenscmidt, Funktionäre, 135-139.

of thousands of members of staff not only of GDR authorities, but also of bankrupt companies proved a significant social burden.

In the light of these developments, it was important to develop strategies which could have provided the new societal and governmental system with legitimacy. This was, in part, acknowledged by Round Table participants. Part and parcel of this task was the deployment of the criminal law.

All of this supports our argument that, in late 1989 and early 1990, criminal trials were seen as an integral, inevitable, and feasible tool of revolutionary justice and was strongly pushed by East German forces. Both investigations and actual trials did, however, mainly happen in the field of economic crimes of former state elites, as well as voter fraud. Arguably, these crimes most directly stood for what GDR citizens felt they had been deprived of for so long: a voice in public affairs and individual economic prosperity. Against the backdrop of revelations of the luxuries which former leaders had enjoyed, one's own material hardships weighed even heavier and could no longer be justified with a greater good, now exposed as hollow. Prosecution of border guards for fatal shots at the border, on the other hand, were not among the most prominent issues contemplated in the revolutionary months – at least not in the documents examined for this study. It would be to sweeping an argument to assume that the killings at the border were a topic that predominantly aroused West Germans. But it may be asked if, perhaps, everyday material deprivations (in contrast to the abundant luxuries of party leaders) were an even more important issue in the GDR, at least once the freedom to travel had been gained in November 1989.

4. Judicial practice after reunification: the case of the border guards trials, 1991-2005

From the outset, the Border Guard Trials were confronted with a series of challenges. These proceedings were the focal point of many ideological and legal debates during German re-unification. Why should re-united Germany's courts have competence to adjudicate on government acts of a state which no longer existed? Or why not? How could those be held accountable for killings at the Berlin Wall and at the Inner-German border who were ultimately responsible, even though they had not pulled the trigger or buried the mine? And why should it be acceptable to punish soldiers who had 'merely followed orders'? These questions mirrored contestations of the GDR's legitimacy of the Cold War, as well as disputes about West Germany's adjudication of National Socialist crimes.

This chapter examines the judicial practice of the Border Guard Trials from 1991 until 2005, and asks how the courts have dealt with the challenges they faced. How did they establish the criminality of the border regime, and how did they assess individual guilt of rank-and-file border guards vis-a-vis military and political elites? To what extent did the judgments reflect the transitional and political nature of the trials, and how did they reflect upon the daily compulsions of life in a dictatorship?

In addressing these and other questions, this chapter argues that the courts quickly developed a coherent legal approach to the most pressing dogmatic questions (1991-93). The jurisprudence reflected a legalistic approach, especially through a textual reading of GDR laws. This was essential for the juridical safeguarding of the convictions, especially against claims that the prohibition of retroactive punishment (*nulla poena sine lege*) had been violated. The Radbruch Formula, a legal principle developed in response to National Socialist crimes, was a lubricant in the interpretation of this law, establishing yet another philosophical

and normative link between the 'Third Reich' and the GDR. With a taxonomy of sentences, mild prison terms and acknowledging remarks on defendants, courts tried to accommodate the tensions inherent in the trials. However, as chapter 5 demonstrates, this mostly failed to have an impact on public perceptions.

This chapter will start out with a detailed exploration of the two first verdicts against border guards, handed down in January and February 1992. Their revisions by the Federal Criminal Court in late 1992 and early 1993 laid the foundation for the rest of the border guard cases. These two proceedings are thus of great significance. I will then present how the courts strove to prosecute former leaders in the cases against members of the National Defence Council (NVR) in 1992-93, and the Politbüro in 1995-97. Lastly, the decisions of the Federal Constitutional Court (1996) and the European Court of Human Rights (2001) will be presented which gave the final and authoritative decisions on the legality of the Border Guard Trials. As a matter of principle in German criminal law, proceedings in regional courts are not recorded, neither audiovisually nor in written form. As the investigative files have not been disclosed for this project, this chapter therefore relies on an examination of comprehensive court verdicts.

Between 1991 and 2005, approximately 75,000 investigations were launched against 100,000 persons. Eventually, 1,021 trials were opened, which saw 1,737 defendants in the dock. Of these, fifty-fourt per cent were convicted, 24,1 per cent were acquitted. In the remaining cases, the proceedings had to be terminated for various reasons. This was a relatively low conviction rate which, in itself, raises doubt as to allegations of 'victor's justice'. Likewise, convicts received exceptionally frequently suspended sentences. A mere three per cent of prison sentences exceeded three years. The biggest case group with regard to the number of proceedings were proceedings for abuse of justice. However, these trials often included serial offenders. Therefore, the trials against border guards and their

superiors, including political and military elites, constitute the biggest case group in terms of defendants: thirty-one per cent of the convicts were sentenced for killings at the border. Proceedings for *Stasi* crimes made up for fourteen per cent.[450] Altogether, 753 persons were convicted: 275 in connection with killings at the border; 181 were convicted for abuse of justice, and 99 for voter fraud. *Stasi* crimes entailed 69 convictions. 42 defendants were sentenced for physical abuse of prisoners, and 47 for doping. In cases for corruption and abuse of office, 13 individuals were found guilty, and 5 persons were convicted for denunciation.[451]

The Gueffroy Case – the First Precedent

The trial against Ingo Heinrich, Peter Schmett, Andreas Kühnpast and Mike Schmidt was opened in May 1991 in Berlin. These four former border guards were charged with manslaughter. The defendants had been on duty as border guards on the night of 5 February 1989. In this night, the twenty-year-old friends Chris Gueffroy and Christian Gaudian attempted to flee the GDR from East Berlin's district of Treptow into West-Berlin's Neukölln near Britzer Allee. Dissatisfaction with their jobs, as well as a fear that Gueffroy could soon be drafted for military service were their main motivations. They chose 5 February 1989 since they mistakenly assumed that an ongoing state visit would prevent the border guards from carrying out fatal shootings – they were wrong in so far as the Swedish Prime Minister had left East Berlin before that day.[452]

Gueffroy and Gaudian started their attempt just before midnight. After they had crossed the three and a half metre high Hinterland wall, they accidentally touched the signal fence which caused an optical alarm to go off. The fugitives then crossed a patrol road, two control strips and a barrage trench before reaching the final fence.

---

[450] ibid.

[451] ibid., chart 21, p. 41.

[452] On the facts of the case, see 'Erstinstanzliches Urteil des Landgerichts Berlin vom 20.1.1992, Az. (532) 2 Js 48/90 (9/91)', in: Marxen, Klaus / Werle, Gerhard (eds): Strafjustiz und DDR-Unrecht. Dokumentation, Berlin: De Gruyter 2002, vol. 2, sub-vol. 1, pp. 5-70 [19-29]

Here, they repeatedly tried to climb the final fence. Equipped only with throwing anchors, and bare of all arms, they posed no threat to border guards.

Kühnpast, one of the defendants, fired twelve bullets a hundred metres away. He claimed to have used continuous fire by accident. His post leader Schmett fired six single shots without hitting the fugitives. Schmidt and Heinrich, however, were much closer. As Schmidt, the post leader, had no weapon, he ordered his subordinate Heinrich: '*Schieß doch!'*. Heinrich fired two single shots on Gueffroy's feet, but the victim remained standing. To prevent the imminent escape, Heinrich then fired a bullet into Gueffroy's chest and pierced his heart. Gueffroy died within minutes. A doctor pronounced him dead at 12.15 am on 6 February 1989. Hospital files were manipulated and Gueffroy's slayers were commended and obliged to remain silent. The death certificate was altered: the cause of death was no longer a 'shot though the heart', but a 'rupture of the heart muscle'. Gaudian was sent to prison and released to West Germany in October 1989.[453]

When the defendants reached Gaudian and Gueffroy, Schmett insulted them. According to his statements during the trial, he did not do that because he had been a stalwart socialist but because the incident meant they could not leave service with 'white gloves'. In fact, none of the defendants appeared to be very political. They had been drafted to the border troops, and they indicated that their overarching goal was to leave service without shooting a fugitive or even having to arrest one.[454]

Kühnpast, Heinrich, Schmett, and Schmidt were in their early 20s when they were conscripted to the border troops. Before that, the Stasi ran background checks to see if they were free of personal and family problems, without prior criminal charges and, perhaps most importantly, to see if they had any personal relationships to West Germany or West-Berlin which might encourage them to desert their comrades for the West.[455]

[453] 'Herzmuskelzerreißung', ibid.
[454] ibid., 8-33.
[455] ibid., 8 and 34.

At the beginning of each shift, the border guards were divided up into pairs. During this so-called *Vergatterung*, officers reminded border guards of their duty to protect the integrity of the border; the implied meaning of this instruction was the prevention of illegal border crossings. . This often included a reference to the rules on the use of firearms. On 5 February 1989, Major Ronald Fabian had done that. As he stated in the trial, he had not spelled out the rules on the use of firearm on this day, but referred to them. As the court stated in the ruling, this appeared to be a 'perfidious dual strategy': the exact rules on the use of firearms were often only communicated in a deliberately nebulous way. As the Landgericht stated, most former border guards who gave testimonies as witnesses indicated that they only had a vague idea that they were supposed to only fire on fugitives' feet to prevent a successful escape. At the same time, officers appear to have repeatedly urged their subordinates to prevent an escape at all costs. This way, an actual order to kill fugitives as a measure of last resort never had to be issued.[456]

According to GDR laws[457], the use of firearms against 'Grenzverletzer' was legal only if an escape was attempted by two or more persons, or with the use of weapons (which included climbing hooks). Human life was supposed to be spared 'where possible' – that is: not unconditionally.[458] Fabian, who was in charge of the defendants' company, acknowledged that the use of firearms was not only tolerated, but supported by officers. As he said in court, soldiers were even being commended for their efforts when they had fired only at a single fugitive. In this case, Fabian conceded, the standard interpretation was that the firing guard had seen a shadow of a second person.[459] In spite of the strategy of deliberately obscuring the command situation, all four defendants in this first case indicated that – to their knowledge –

[456] ibid, 50.
[457] § 27 GrenzG in conjunction with § 213 StGB.
[458] § 27 (5) GrenzG states: 'Bei der Anwendung der Schußwaffe ist das Leben von Personen nach Möglichkeit zu schonen. (…) '
[459] Urteil des Landgerichts Berlin vom 20.1.1992, Az. (532) 2 Js 48/90 (9/91), in: Marxen, Klaus / Werle, Gerhard (eds): Strafjustiz und DDR-Unrecht. Dokumentation, Berlin: De Gruyter 2002, pp. 5-70, [p. 50].

the use of firearms was legal only in cases of desertion, when heavy equipment was used by fugitives, or when an escape was attempted by groups of two or more. Gaudian's and Gueffroy's attempted escape fell into this last category.[460]

The regional court's verdict was handed down on 20 January 1992. As this was the first verdict ever on the border guards, both its outcome as well as its legal reasoning had been long awaited. Eventually, the *Landgericht* sentenced Heinrich to three years and six months in prison. Kühnpast received a suspended prison sentence of two years.

The first major question which the court had to address was the question if the defendants' actions had been criminal at all. In the words of the court, it had to answer the question whether '(…) ... everything is lawful that has been formally and by interpretation been regarded as law.'[461] The court negated this question and chose a bold justification grounded in natural law. Referring to an earlier FCJ ruling of 1952, the judges argued that 'there is a core area of law which, according to the general public's awareness of the law, no law or official act of the state may affect.'[462] The verdict then quoted the FCJ's ruling which defined that this 'core area of the law' as including:

> '(…) certain principles of human conduct which are regarded as inviolable and which have evolved over time among all civilised peoples on the basis of consistent moral beliefs and which are regarded as legally binding, irrespective of whether individual provisions of national legal systems appear to permit them to be disregarded.'[463]

---

[460] ibid., 15.

[461] '(…) alles rechtens ist, was formal und durch Auslegung als Recht angesehen worden ist.', ibid., p. 51.

[462] '(…) es einen Kernbereich des Rechts gibt, den nach dem Rechtsbewusstsein der Allgemeinheit kein Gesetz und kein obrigkeitsstaatlicher Akt antasten darf.' ibid., 51.

[463] 'Er umfaßt bestimmte als unantastbar angesehene Grundsätze des menschlichen Verhaltens, die sich bei allen Kulturvölkern auf dem Boden übereinstimmender sittlicher Grundanschauungen im Laufe der Zeit herausgebildet haben und die als rechtlich verbindlich gelten, gleichgültig, ob einzelne Vorschriften nationaler Rechtsordnungen es zu gestatten scheinen, sie zu mißachten.' BGHSt 2, 234 (237), quoted in: Urteil des Landgerichts Berlin vom 20.1.1992, Az. (532) 2 Js 48/90 (9/91), in: Marxen, Klaus / Werle, Gerhard (eds): Strafjustiz und DDR-Unrecht. Dokumentation, Berlin: De Gruyter 2002, pp. 5-70, [p. 51].

This notion was not without precedent. It referred to the 'Radbruch Formula', a legal principle formulated by German law professor Gustav Radbruch in the wake of World War II. He qualified the legal positivism of his time by adding that the positive law had to yield to 'justice', when 'the conflict between the positive law and justice reaches such an intolerable degree that the law as "incorrect law" has to give way to justice'.[464] This was a modification of legal positivism, not a refutation, but it was the basis of high court jurisprudence on National Socialist state crime.[465]

The verdict in the Gueffroy case argued that these principles also had to be applied in the border guard case. However, it was careful not to equate the GDR with the 'Third Reich'. The court emphasised that such concepts had been developed as part of attempts to bring justice after the deeds of the Nazi regime, '(…) the enormity of which cannot be compared with the facts at issue here'.[466] But the principles were believed to be applicable as '(…) the protection of human life is general and cannot depend on certain figures of killings'.[467] In the view of the court, the gross 'mismatch' between the aim of preventing illegal border crossings and the measure of taking human life meant that any such law '(…) deserved no respect and was to be denied obedience'.[468] Killing citizens for wanting to leave the country only secured the 'continued existence' of a 'totalitarian' regime and was to be understood as violating 'fundamental principles of law and humanity'.[469]

---

[464] '…der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als "unrichtiges Recht" der Gerechtigkeit zu weichen hat', in: Radbruch, Gustav: *'Gesetzliches Unrecht und übergesetzliches Recht',* in: Süddeutsche Juristenzeitung 5, August 1946, printed in: Radbruch, Gustav: Rechtsphilosophie, Stuttgart: K.F. Koehler [4]1950, pp. 347-57, [p. 353].

[465] Wilke, Identitätsbildung.

[466] 'Diese Rechtssätze sind zwar aus Anlaß der Verbrechen des nationalsozialistischen Unrechtsregimes in Deutschland entwickelt worden, die in der Ungeheuerlichkeit ihres Ausmaßes mit dem hier in Rede stehenden Sachverhalt nicht vergleichbar sind.', ibid., 52.

[467] 'denn der Schutz menschlichen Lebens gilt ganz generell und kann nicht vom Eintritt einer bestimmten Anzahl von Tötungen abhängig sein', ibid., 52.

[468] 'Mißverhältnis' ; 'daß eine solche Regelung keinen Respekt verdient und ihr der Gehorsam zu verweigern war', ibid.

[469] 'Fortbestand totalitären Machtsystems', 'fundamentale Grundsätze des Rechts und der Menschlichkeit', ibid.

The court was also careful to counter potential criticism. It thus engaged in a contemplation as to why West German state practice of securing borders differed from GDR state practice, especially by referring to the principle of proportionality.[470] Also, it rejected the idea that West Germany had legitimised the GDR border regime by signing the Basic Treaty of 1972. The *Landgericht* reiterated the FCC's ruling on the treaty of 1973 where the supreme court judges had argued that the GDR border regime was 'incompatible' with the basic treaty and that the Federal Government was obliged to continuously seek to change the situation at the Wall and Inner German border.[471]

Lastly, the court also discussed if the prohibition of retroactive punishment prevented any trials against border guards. This legal principle, first testified in ancient Rome as *nullum crimen, nulla poena sine lege*, is a pillar of criminal law throughout Western legal traditions. It holds that a deed can only be criminal and a person can only be sentenced for a crime that was illegal at the time when it was committed. In Germany's legal order, it is enshrined in Art. 103 (2) Basic Law which prevents retroactive punishment. It is also enshrined in Art. 7 ECHR, where section two makes exceptions for gross violations of fundamental rights by providing that:

> 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

In this case, the regional court (*Landgericht*) referred to previous decisions of the Federal Constitutional Court where it had been held that in certain cases where gross human rights violations were concerned, 'substantive justice' had to take precedence over the principle of legal certainty as expressed in the rule of *nulla poena*.[472] This line of argument concluded the *Landgericht*'s decision on the criminality of shooting at fugitives as such.

---

[470] ibid., 53-55.
[471] ibid., 55.
[472] ibid., 55.

In a next step, individual guilt of the defendants had to be assessed. Heinrich was convicted of manslaughter with conditional intent, meaning that he had acquiesced to Gueffroy's death. Criminal investigations had proved without any doubt that the fatal bullet stemmed from Heinrich's rifle. The court believed that Heinrich had fired voluntarily and that no order had been given to actually take Gueffroy's life. In any case, according to § 258 StGB-DDR, soldiers had to disobey an order when this order was obviously illegal. The court believed that in this case, there was neither an order to kill the fugitives nor could it have been legal, had it existed.[473]

Arguably, the court was quite considerate in assessing the defendants' room for manoeuvre as GDR border guards. It was argued that even in the GDR, 'justice and humanity' (*Menschlichkeit*) were upheld as educational values. Thus, the court argued it was 'unimaginable' that Heinrich could not have been able to 'identify the few principles indispensable for human coexistence, which belong to the inviolable foundation and core area of law as it lives in the legal consciousness of all civilised peoples'.[474]

More reasons why Heinrich and his comrades could have known the reprehensibility of using firearms against fugitives were presented. The court argued that military service at the border was widely unpopular in East Germany's society, and that most border guards tried to leave service with so-called 'white gloves', meaning to avoid arresting or even assaulting a fugitive while on duty. In the view of the regional court (*Landgericht*), this reflected a deep unease with the use of firearms. Moreover, it was argued that border guards must have realised that the border was primarily directed against GDR citizens and not against violent attacks from the East by the set-up of the Wall which clearly was designed to

[473] ibid., 57.

[474] 'Gerechtigkeit und Menschlichkeit', 'die wenigen, für das menschliche Zusammenleben unentbehrlichen Grundsätze, die zu dem unantastbaren Grundstock und Kernbereich des Rechts gehören, wie er im Rechtsbewusstsein aller Kulturvölker lebt, nicht habe erkennen können', ibid., 57-58.

prevent illegal crossings from East to West. Lastly, the court referred to Heinrich's statement during the trial that before coming to the border troops: he himself had believed that killing fugitives was illegal and equated to an unlawful death penalty.[475] In this light, the court argued, border guards were called upon to examine their conscience long before actually encountering an attempted escape. And 'when it comes to killing people in the interest of maintaining power of the authorities', the court concluded, 'one should not turn off one's conscience so quickly in the last quarter of the twentieth century'.[476] Thus, Heinrich should have known that killing a fugitive for the sake of protecting the border's integrity was illegal irrespective of any commands; in spite of this, doing so required at least conditional intent to kill Gueffroy.

As for Kühnpast, who had fired several salvos of continuous fire at the fugitives, the court assumed attempted manslaughter with conditional intent. Relying on the same legal interpretation of the law, the court argued that Kühnpast had to know the criminal nature of killing fugitives. Although Kühnpast had fired several salvos of continuous fire, he had claimed in court that he did not know his rifle was set on continuous fire. The court therefore assumed conditional intent to kill only from the second salvo onwards.[477]

Kühnpast had claimed that he had deliberately missed Guardian and Gueffroy by three to four metres. Based on forensic tests, however, the court argued that a Kalashnikov rifle usually scattered more than three metres to every side when used from a distance of a hundred metres. Kühnpast, however, was 125 metres away from the fugitives. Thus, the court believed he must have known that he grossly endangered the fugitives.[478]

---

[475] ibid., 58-59.
[476] 'Wenn es um die Tötung von Menschen im Interesse der Machterhaltung der Obrigkeit geht, darf man aber im letzten Viertel des 20. Jahrhunderts sein Gewissen nicht so schnell abschalten.' ibid., 59.
[477] ibid., 61-64.
[478] ibid., 62.

At the same time, the court saw even more reason to believe that Kühnpast knew of the wrongfulness of shooting fugitives. When being drafted to the border troops, Kühnpast was asked if he would use his weapon against 'Grenzverletzer', if necessary. This question was put to every conscript. Kühnpast initially refused to use his rifle and was subsequently ordered to kitchen service. His comrades teased him for that by calling him 'cockroach' which he perceived as a severe humiliation.[479] Later, he agreed to use weapons if need be in order to avoid future bullying. The court held this against him: 'Nobody may switch off his conscience so quickly and only to protect himself from teasing by comrades.'[480]

Schmett and Schmidt were acquitted, as any (conditional) intent to kill Gueffroy or Gaudian could not be proven. In Schmidt's case, the court thought it impossible to prove that his order to fire had meant to actually kill Gueffroy. As for Schmett, the court acknowledged that he might have only fired at the fugitives' feet. When firing single shots over a distance of one hundred metres, the rifle was proven to only scatter up to thirty-six centimetres. In the view of the court, this meant that firing single shots at the feet could not have resulted in the fugitives' death. Therefore, he could not be convicted of attempted manslaughter.[481] This technical examination of the rifle's features reached a very detailed level of assessing evidence. They were, however, arguably also a form of sidestepping difficult examinations of conscience and intent.

However, both cases could have been seen as a (conditional) intent to inflict bodily injury when they were aiming at Gueffroy's and Gaudian's feet (Schmett) or ordering Heinrich to do so (Schmidt). However, the court accepted that this could have been covered by the GDR border law by arguing that only in 'extreme cases' could the 'demand for substantive justice' take precedent over legal certainty. In

[479] ibid., 29
[480] 'So schnell und nur um sich vor Hänseleien durch Kameraden zu schützen, darf niemand sein Gewissen abschalten.', ibid., 62.
[481] ibid., 64-67.

the case of bodily injury, the court assumed that the defendants could not have been expected to realise the criminal nature of assaulting fugitives.[482]

Still, the court made clear that it had no doubts regarding the criminal nature of the border regime *in toto*. In its view, the prohibition of exiting the country was not a norm against crimes, but a political measure to stabilise the 'coercive regime'[483] The court went on to argue that such harsh measures did not exist in 'Rechtsstaaten', while 'totalitarian and especially communist states were characterised by harsh border barriers and travel restrictions'.[484]

When assessing the sentences, the court acknowledged that a series of reasons supported comparatively mild sentences for the defendants. It believed that the GDR had 'nurtured them to blind one-sidedness and a limited conception of the world' which the defendants had not been able to withstand.[485] The court also accepted as a mitigating factor that those who were responsible for the ideological indoctrination could not be brought before a court in the absence of an appropriate punishable offence.[486] However, in Heinrich's case the court saw as exacerbating factor that his killing of Gueffroy from a close distance of only approximately forty metres demanded 'a particular degree of callousness and reprehensibility'.[487] Hence, he received a punishment in the upper region of proposed sentences.

For the sake of completeness, it should be noted that both the commander of the respective company, Ronald Fabian, and the regiment's commander were later charged and convicted of accessory to manslaughter. Fabian received no sentence,[488] while regiment commander Walter Schulze was sentenced to two years

[482] 'extreme Fälle', 'Erfordernis materieller Gerechtigkeit', ibid., 64-66.
[483] 'Zwangsregime', ibid., 65.
[484] 'totalitäre und besonders kommunistisch beherrschte Staaten durch strenge Grenz- und Reisesperren geradezu gekennzeichnet waren.', ibid., 65.
[485] '(…) zu blinder Einseitigkeit und einem beschränkten Weltbild erzogen hat, dem die Angeklagten ihrer Persönlichkeit und Bildung nach nur wenig entgegenzusetzen hatten', ibid., 67.
[486] ibid.
[487] 'ein besonderes Maß an Gefühlskalte und Verwerflichkeit', ibid., 67.
[488] Urteil des Landgerichts Berlin, 15 December 2000, Az. (536) 27/2 Js 299/91 Ks (2/2000).

and three months in prison.[489] Given that Heinrich's sentence was alleviated after his successful appeal (see below), Schulze as a commander did eventually receive harsher sentences than those who carried out the actual attack – and other than the usual border guards' sentence, Schulze's sentence had not been suspended.

Summing up this first precedent judgement, it seems fair to say that Berlin's *Landgericht* made a coherent argument as to a) why border guards' fatal shots at fugitives had to and could be seen as criminal, and b) why the individual defendants in this case had incurred individual guilt. The court's argument was based on a natural law approach which was routed in West Germany's jurisprudence on Nazi crimes, essentially arguing that some fundamental rights like the right to life could not be arbitrarily limited by states and that any such laws were not to be seen as laws at all. While the court was careful to seriously take into account the defendants' statements, motivations and histories, it also provided important assertions about the set-up of the border regime by hearing witness testimonies of commanders and border guards alike. Only a few days after this verdict, however, a different chamber of the same court in Berlin delivered the second verdict in a border guard case – and revealed that this fist verdict's approach was not the only possible way of seeing the criminality of the GDR's border regime.

Michael Schmidt's death in 1984: The Second Border Guard Case

'You have got me now' said Michael Schmidt at around 3.15 am on 1 December 1984, lying on the ground and bleeding, as two border guards stood over him. Just a few seconds earlier, Schmidt's hand was reaching unto the top of the final wall and he had almost succeeded in his attempt to flee the GDR, when bullets from the rifles of Udo Walther and Uwe Hapke hit Schmidt and caused him to fall off the ladder. The two border guards later acknowledged that they did not think Schmidt

[489] Urteil des Landgerichts Berlin vom 21.8.2000–Az. (529) 27 Js 2/99 Ks (19/98).

a criminal or a saboteur, but saw him as a young man aspiring to find his happiness in West-Berlin.[490]

Among his colleagues, the twenty-year-old Schmidt was a popular carpenter. His dissatisfaction with the GDR had been growing for some time when on the night of 30 November, he enjoyed some drinks in a youth club. Later that evening and accompanied by another anonymous person, he got himself a ladder and marched to the Hinterland wall with the intention to flee the GDR for West-Berlin.[491]

The defendants, Udo Walther and Uwe Hapke, had been conscripted to the border guards during their military service. When they had been asked if they would direct their weapon against fugitives at the border, they had both agreed without any reservations.[492] On the night in question, they were deployed to substitute posts during shift changeovers. Walther discovered Schmidt crossing the *Hinterland* wall near Schulzestraße in Berlin-Pankow. In the following minutes, Hapke climbed down the watch tower while Walther, who had remained on the tower, unsuccessfully ordered Schmidt to stop. Hapke reached the final wall approximately at the same time as Schmidt did, but more than one hundred metres away from the fugitive. Hapke then decided to shoot at Schmidt to prevent his imminently surmounting the Wall. In the next five seconds, he fired at least twenty-five shots in continuous fire, thereby accepting wide scattering. About 150 metres away, Walther now also fired several salvos of continuous fire with a total of twenty-seven shots on Schmidt's legs.[493]

Schmidt was heavily injured, as one bullet had torn part of his left lung, but he lived. However, he was denied appropriate first aid. As described by regulations, the superiors did not call a regular ambulance but a special military ambulance

[490] Ersinstanzliches Urteil des Landgerichts Berlin, 5 February 1992, Az.: (518) 2 Js 63/90 KLs (57/91), in: Marxen, Klaus / Werle, Gerhard (eds): Strafjustiz und DDR-Unrecht. Dokumentation, Berlin: De Gruyter 2002, vol. 2, sub-vol. 1, pp. 105-134 [107-113].
[491] ibid.
[492] ibid., 108.
[493] ibid., 110f.

which had an approach of roughly forty-five minutes and was not accompanied by a medical doctor. Schmidt was not brought to the closest hospital, but to a specific police hospital further away where he was admitted as 'XY' shortly before 5.30 a.m., more than two hours after being injured. All of this was in line with official commands. Even though hospital staff immediately prepared emergency surgery, Schmidt died from internal bleeding at 6.20 a.m. A medical examination clearly revealed that he would have survived had he been treated properly and quickly.[494] His death was covered up in official files and Schmidt's father, who had reported his son as missing, was only informed of his death four days later.

Hapke and Walther were tried in the same *Landgericht* in Berlin which had sentenced Heinrich and Kühnpast. However, the judges in the case at hand took a whole different route in their reasoning as to why the shots that had killed Schmidt had to be deemed criminal. Their judgement also has to be understood as a negative comment on their colleagues' decision from two weeks earlier.

In this case, the court chamber rejected the notion of the border regime violating fundamental principles of law. They argued that the prohibition of slavery, genocide, torture, or arbitrary killings were parts of such an 'core area of the law' which could not be violated. They would be part of *ius cogens,* a universally recognised part of public international law which is generally valid and non-negotiable. The right to leave one's country was – in the eyes of the chamber – not part of this codex.[495] The court acknowledged that the GDR had still ratified a series of international human rights treaties such as the Universal Declaration of Human Rights (UDHR) of 1948 or the International Covenant on Civil and Political Rights (ICCPR) of 1976. But since the *Volkskammer* had not adopted these documents into national law, the chamber argued that the treaties were binding the GDR *on the*

[494] ibid., 112-13.
[495] ibid., 120-22.

international plane only without being directly applicable and hence valid in domestic law.[496]

In this case, the judges also rejected any comparison of the border regime with Nazi crimes (such as murder, genocide, enslavement, torture, and others) which had been judged in the Nuremberg Trials as violating that 'core area of the law' as Radbruch had later put it and which had been quoted by the other chamber in the Gueffroy case.[497] Thus, referring to the Radbruch Formula according to which the positive law has to be disregarded in favour of natural law in otherwise grossly unjust situations, the chamber argued that in the case of the GDR border regime, the conflict between justice and legal security had to be decided in favour of legal security. The court described the restrictions caused as 'hard and unjust', but did not believe that they had reached the threshold of being 'intolerable injustice'. GDR law therefore had to be respected.[498]

Eventually, the court acknowledged the relevant paragraphs prohibiting unlawful departures (§ 213 StGB-DDR) and permitting the use of firearms to prevent such crimes (§ 27 GrenzG) had to be seen as a valid and applicable law which actually allowed for guns to be used against fugitives.[499] Unexpectedly, however, the court did then go on to assert that in the case *at hand,* these GDR regulations had been breached and that therefore killing Schmidt had been criminal and the defendants were guilty of manslaughter with conditional intent.[500]

More specifically, the court argued that a principle of proportionality was inherent in GDR law. Expressions such as the one that human life should be spared 'where possible' in § 27 (5) of the border law were seen as proof of this assumption.[501] The court acknowledged that this principle might have only been

[496] ibid.
[497] ibid., 122.
[498] 'hart und ungerecht', 'unerträgliches Maß an Ungerechtigkeit', ibid., 122.
[499] ibid., 124.
[500] ibid., 124-25.
[501] ibid., 125.

inherent in positive law, but not in state practice, as the deployment of spring-guns suggests. Still, the court maintained that a law 'which resembles the rule of law – even if only for reasons of international prestige – has to be interpreted in a way compatible with the rule of law.'[502]

Interpreted in such a way, the court believed that the GDR border law prohibited the use of fatal gun fire against an unarmed and ostensibly harmless fugitive such as Schmidt. This was particularly true for the defendant's use of continuous fire.

To sum up the court's judgement on the punishability of the shots: the chamber essentially claimed that the border law itself might have been unjust, but not sufficiently iniquitous to warrant the application of the Radbruch Formula. In the absence of any other international or national regulations banning state practice at the Wall, the border regime hence had to be seen as legal. The judges then applied the principle of proportionality which they accepted was not recognised in state practice, but was warranted by the wording of the relevant law. Thus, the defendants had violated the criminal law by using continuous fire and thereby accepting Schmidt's death with acquiescence.

Regarding Hapke's and Walther's individual guilt, the court held that they clearly had to refuse their order to prevent breaches of the border no matter the cost, as it was 'obviously' violating the criminal law.[503] In a surprisingly condescending statement, the judges asserted that:

> 'with proper use of their conscience, the intellectually simply structured defendants (…) would have been able to recognise that military obedience does not justify every action, certainly not the killing of a fugitive under the circumstances present here in the case at hand'.[504]

[502] 'Ein Gesetz, das den Anschein von Rechtsstaatlichkeit – sei es auch nur aus Gründen internationalen Ansehens – erweckt, ist nach rechtsstaatlichen Grundsätzen auszulegen.' ibid., 126.
[503] ibid., 127.
[504] 'die intellektuell einfach strukturierten Angeklagten, deren Entwicklung durch eine strenge, von Feindbildern geprägte militärische Schulung beeinflußt war, hätten bei gehöriger Anspannung ihres Gewissens erkennen können, daß militärische Pflichterfüllung nicht jedes Handeln, schon gar nicht die Tötung eines Flüchtlings unter den hier im konkreten Fall vorliegenden Umständen rechtfertigt' ibid., 129.

Therefore, their use of continuous fire had to be seen as acts of 'anticipatory obedience'.[505] When assessing the level of penalties, the chamber opted for relatively low sentences given that developing a 'critical stance' against the border regime was difficult for the defendants as they were 'at the bottom of societal and military hierarchy'.[506] Walther was sentenced to a suspended juvenile sentence of eighteen months in prison and Hapke to twenty-one months on parole.[507]

This judgement took a different route than the first border guard case and yet it came to the same conclusion: fatal shots at the Berlin Wall were criminal. However, in the Schmidt case, the judges were careful not to pass an (implicit) sentence on the border regime *in toto*, but only on the actions of the defendants at hand. The GDR's state practice at the border on the other hand was largely accepted, including potentially the death of fugitives. Only in this specific case did the judges see a violation of the criminal law in the defendants' ignoring of the principle of proportionality – a principle that was not enshrined in GDR law word by word, but which the court had derived from the structure of certain paragraphs. On the whole, it seems fair to describe this judgement as more positivist and inductive than the verdict against Kühnpast and Heinrich in the first border guard case.

With two quite divergent low court verdicts having been spoken, it was clear that the Federal Court of Justice was called upon to decide whether those two landmark decisions against Heinrich and Kühnpast as well as Hapke and Walther could be upheld – and how. After all, the FCC had to finally adjudicate on the criminal nature of the GDR border regime – and the two chambers of Berlin's Landgericht had brought the FCC into a situation where it had to choose which path to follow.

---

[505] 'in vorauseilendem Gehorsam', ibid., 127.
[506] 'Die Entwicklung einer kritischen Haltung und die entsprechende Betätigung war für die Angeklagten um so schwerer, als sie in der gesellschaftlichen und militärischen Hierarchie ganz unten gestanden haben.' ibid., 131.
[507] ibid.

Ensuring Clarity: The Federal Court of Justice's leading decisions, 1992-93

In Germany's legal hierarchy, the Federal Court of Justice (FCJ) is the high court of appeal for all matters of ordinary jurisdiction – namely matters of private and criminal law. Its verdicts can only be overturned by the Federal Constitutional Court (FCC), and only in such cases where a verdict would violate the constitution.[508] Hence, the FCJ does what high courts usually do: giving guidance for jurisdiction of lower courts. This way, verdicts in similar cases are streamlined and it is ensured that jurisdiction across the country is coherent and legally waterproof. Instances where new legal challenges emerge in particular lead to high courts being called upon to provide directions. The border guard cases are a prime example.

The opportunity to deliver a leading decision on the border guard cases presented itself quickly after the first two verdicts. An FCJ ruling was especially needed after both verdicts differed so strongly not in their outcome, but in their legal reasoning. However, a sound legal reasoning was paramount for more cases to go ahead as otherwise, a negative ruling of the Federal Constitutional Court loomed, especially regarding the prohibition of retroactive punishment.

The main task the FCJ had to master was to clearly establish whether fatal shots at the Berlin Wall and the Inner German border were punishable at all – and if so, under what legal norms: East German criminal law, West German criminal law, or supra-positive legal norms? Moreover, the high court had to take into account how these finds could be squared with the ancient principle of *nulla poena sine lege*, the prohibition of retroactive punishment, which is enshrined in Germany's Basic Law as well as in the European Convention on Human Rights.[509] Apart from these highly relevant, yet somewhat legalistic challenges, the high court also faced high expectations of the public regarding the outcome of the case: were border guards

[508] Art. 93 Basic Law. Cf. Kirchhof, Ferdinand: *'Bundesverfassungsgericht',* in: Staatslexikon der Görres-Gesellschaft, Vol. 1, 8th edition, Freiburg: Herder 2017, 889-893.
[509] Art. 103 (2) Basic Law, Art. 7 ECHR.

guilty or not of killing innocent fugitives – and where was the place of their superiors and former state leaders in all this?

The FCJ's first Mauerschützen verdict

It was especially the *Schmidt* case that gave the FCJ the opportunity for a landmark decision, as the FCC chose to decide in this case first. Initially, the judges had to contemplate if any procedural impediments prevented German courts from judging Hapke and Walther altogether. In his appeal, Walther had referred to a 'ban on punishment'[510] which he believed had to be derived from the 'act of state-doctrine'. According to this doctrine, an office holder who acts on behalf and in the interest of another state (in this case, the GDR), cannot be held accountable for acts committed while he was on duty.[511] The FCJ rejected this claimed procedural impediment. It argued that this doctrine of 'act of state' was an Anglo-Saxon judicial doctrine and was not recognised in continental Europe. It thus could not be seen as a 'universal rule of international law' which had to be respected by German domestic law.[512]. Moreover, the FCJ argued, the German Reunification Treaty (GRT) had specifically allowed for courts of the Federal Republic to overrule and repeal GDR courts' judgements if those violated the principles of the rule of law. Thus, the court concluded that former GDR officials were not spared from prosecution by courts.[513]

[510] 'Bestrafungsverbot'

[511] For this sub-section, see Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [pp. 135-36].

[512] Art. 25 Basic Law reads: 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.' ('Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes.'

[513] Art. 18 TGR.

The central question: Were the shots criminal?

The FCJ now turned to the major question of whether the GDR law had permitted the shots on the victim Schmidt and whether the defendants had to be exonerated as a result. Eventually, the senate concluded that nothing in GDR law could justify the deeds in question and that they had indeed been criminal. But as we will see in this section, it was a meandering and intellectually-demanding road that lead the court to this conclusion. Given that Schmidt had carried out his attempted escape with ladders, the FCJ acknowledged that the text of § 27 of the border law permitted the use of gunfire against Schmidt in order to prevent the imminent crime.[514] Since the law stated that human life should only be spared 'where possible', the FCJ believed that killings with conditional intent could have been permitted under GDR law. The FCJ took this interpretation even so far as to accept the use of automatic gunfire in order to prevent an escape.[515]

For the moment, this conclusion differed remarkably from both initial judgements. Here, one judgement had assumed that the border regime altogether and especially the use of lethal force against fugitives necessarily violated fundamental legal principles; the other judgement had assumed that the use of gunfire might be legal while lethal force would be intolerable due to the principle of proportionality. The FCJ rejected this notion and argued that the principle of proportionality was indeed a good interpretative tool for the law of the Federal Republic. But it was alien to GDR law and hence irrelevant for the test of whether GDR law provided a justification for the deeds in question.[516]

---

[514] Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [pp. 139-42].
[515] ibid.
[516] ibid.

Nonetheless, and slightly nerve-wracking for those of us without a professional legal education, this was not the end of the story: the FCJ still found reasons for disregarding the permission which it had only just established. Because in a next step, Germany's highest criminal court found that the justification inherent in GDR law violated superior legal considerations. With this twist, the FCJ agreed with the first verdict against Heinrich and Kühnpast which had argued that their actions violated the 'core area of the law'. Even though the defendants actions had been 'legal' within the state practice of the time, the FCJ considered them criminal, as the very legal provision permitting these acts was illegal. The court argued that under the legislation in place, preventing illegal border crossings was seen as paramount and overrode a human 'right to life', thereby violating international human rights and basic principles of justice.

The FCJ acknowledged the trickiness of relying on the Radbruch Formula and therefore reiterated its warning that '*... cases in which a justification accepted at the time of the offence is considered irrelevant must be limited to extreme exceptions.*'[517] In the eyes of the senate, such exceptional situations would be characterised by

> '(…) a blatantly gross violation of the fundamental ideas of justice and humanity; the violation must be so grave that it violates the legal convictions common to all peoples and relating to the value and dignity of man. The contradiction between the positive law and justice must be so intolerable that the law as an incorrect right must give way to justice.'[518]

[517] 'Allerdings müssen Fälle, in denen ein zur Tatzeit angenommener Rechtfertigungsgrund als unbeachtlich angesehen wird, auf extreme Ausnahmen beschränkt bleiben.' ibid., p. 142.
[518] 'Ein zur Tatzeit angenommener Rechtfertigungsgrund kann vielmehr nur dann wegen Verstoßes gegen höherrangiges Recht unbeachtet bleiben, wenn in ihm ein offensichtlich grober Verstoß gegen Grundgedanken der Gerechtigkeit und Menschlichkeit zum Ausdruck kommt; der Verstoß muß so schwer wiegen, daß er die allen Völkern gemeinsamen, auf Wert und Würde des Menschen bezogenen Rechtsüberzeugungen verletzt (BGHSt 2, 234 [239]). Der Widerspruch des positiven Gesetzes zur Gerechtigkeit muß so unerträglich sein, daß das Gesetz als unrichtiges Recht der Gerechtigkeit zu weichen hat', ibid., p. 142f.

This was a clear and unmistakable reference to the Radbruch Formula – the legal principle which the first verdict had relied upon while the second had disregarded its application in these cases. In applying the Radbruch Formula to the Schmidt case, the FCJ was sensitive not to equate socialist state crime with Nazi mass murder: 'Transferring these aspects to the present case is not easy because killing of people at the Inner German border cannot be equated with National Socialist mass murder.'[519] Yet, the Senate thought it appropriate to apply this paradigm anyway as it was important to examine if a state had violated the *'outmost boundary ... which it is generally believed is set in each country.'*[520] With this, the court once more followed the first verdict while rejecting the claims of the second verdict.

Moreover, the court found that international human rights set a limit to the GDR's border regime. It referred to the International Covenant on Civil and Political Rights (ICCPR). This treaty was was adopted by the UN General Assembly in 1966 and entered into force in 1976. Ratified by 172 states, this legal document by no means reflects solely Western concepts of human rights.[521] The ICCPR had entered into force for both German states on 23 March 1976. Even though the GDR had not changed its constitution as a consequence, it was nevertheless legally bound one the place of public international law. In the eyes of

[519] 'Die Übertragung dieser Gesichtspunkte auf den vorliegenden Fall ist nicht einfach, weil die Tötung von Menschen an der innerdeutschen Grenze nicht mit dem nationalsozialistischen Massenmord gleichgesetzt werden kann.' Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, p. 143.

[520] 'äußerste Grenze' ; 'die ihm nach allgemeiner Überzeugung in jedem Land gesetzt ist', ibid., p. 143.

[521] For the following deliberations of the court on the International Covenant on Civil and Political Rights (ICCPR) and its obligations on the GDR, see ibid., section 'C', II, 2 b) cc), pp. 143-147. For information on the ICCPR, see Tomuschat, Christian: *'International Covenant on Civil and Political Rights, Human Rights Committee*', in: : Bernhardt, Rudolf (ed.): Encyclopedia of Public International Law, Vol. II, Amsterdam et al.: Elsevier 1995, pp.1115-19.

the FCJ, this had been confirmed by GDR international law textbooks. The court quoted the covenant's provision that '[e]veryone shall be free to leave any country, including his own.'[522] Moreover, the clause specifies that any exceptions of the right must be provided by law, and must be necessary to protect 'national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'.[523] The GDR followed this requirement by passing the *Paßgesetz* (passport act) in 1979. But since outbound passages from the GDR were usually prohibited – and not merely in single cases –, the FCJ argued that the factual border regime violated this human right of the ICCPR.

Despite acknowledging varying interpretations of the law in different world regions, the FCJ claimed a crucial singularity of East Germany's border regime:

> '[It] was particularly harsh because Germans from the GDR had a special motive for wanting to cross the border into West Berlin and West Germany: they belonged to one nation with the people on the other side of the border and were connected to them through a variety of family and other personal relationships.'524

What's more, the FCJ referred to the 'right to life' as enshrined in international human rights treaties, such as the ICCPR which states that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[525] After a wide survey of varying national legal orders, the court concluded that the use of lethal force (like firearms) was usually limited to situations where life and limb of others were at stake. Therefore, the FCJ

---

[522] Art. 12 (2) ICCPR.
[523] Art. 12 (3) ICCPR.
[524] 'Das Grenzregime der DDR empfing jedoch seine besondere Härte dadurch, daß Deutsche aus der DDR ein besonderes Motiv für den Wunsch, die Grenze nach West-Berlin und Westdeutschland zu überqueren, hatten: Sie gehörten mit den Menschen auf der anderen Seite der Grenze zu einer Nation und waren mit ihnen durch vielfältige verwandtschaftliche und sonstige persönliche Beziehungen verbunden.' Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [p. 145].
[525] Art. 6 (1) ICCPR.

argued that using lethal force with the partial aim of deterring others from fleeing the GDR clearly was an arbitrary act and therefore violated the ICCPR's right to life.

As a consequence, the court found that the GDR regulations in question violated international human rights treaties to which the GDR was party. Thus, the FCJ believed that no law could justify the fatal shots on Schmidt, as such a legal provision had to be considered invalid. According to the FCJ, '[e]ven the GDR would have had to interpret the justification restrictively on the basis of the (international, P.E.) principles' recognised by the GDR herself.[526]With this move, the FCJ elevated itself to the authoritative interpreter of GDR laws and their relation to public international law. Ruling that East German laws had been in violation of international obligations of the GDR allowed the FCJ in a next – and arguably quite bold move – to develop an interpretation of the GDR border law which was consistent with international human rights treaties. The FCJ wanted to test if he defendants' actions could have been warranted by such a human-rights-friendly interpretation of GDR laws.

In developing such a human-rights-friendly reading of GDR law, the court applied solely GDR's own constitution. The judges referred to Art. 89 (2) of the GDR's constitution which gave constitutional law primacy over statutes: no law must contradict the constitution itself – a principle very familiar to Western legal thought, but not even in Europa universally valid.[527] Beyond this provision, however, the court failed to detect a 'right to life' in the GDR constitution, whereas

[526] '(…) weil bereits die DDR bei Zugrundelegung der von ihr anerkannten Prinzipien den Rechtfertigungsgrund hätte einschränkend auslegen müssen', Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [p. 147].
[527] Kielmansegg, Freiheit, 151.

in the case of West Germany, the country was bound to a right to life by Art. 2 ECHR. Still, the FCJ acknowledged an 'implicit respect' of human life inherent in GDR law, for example through its obligations under the ICCPR, or in the abolition of capital punishment in 1987. In a somewhat questionable equalisation, the court ruled that this finding was comparable to the principle of proportionality inherent in West German law. In doing so, the FCJ re-introduced the principle of proportionality which it had rejected in the lower court's judgement just before.

Interestingly, given the nuanced debate about parallels between the 'Third Reich' and the GDR in legislative processes (see Chapter 3), the court clearly denied the existence of a GDR equivalent to Hitler's *Führerwille*[528] in the Nazi dictatorship. The 'sheer will of the holders of actual power' had not been able to 'create law'.[529] Therefore, the court claimed, it was perfectly legitimate to interpret GDR laws in accordance with the country's constitution and obligations from international law. Eventually, then, the FCJ stated that GDR laws had to be interpreted in accordance with the human rights to life and free movement[530] as well as in accordance with the principle of proportionality which the FCJ had come up with just moments earlier. Therefore, qualifying a breach of the border with a ladder as 'felony' (*Verbrechen* as opposed to a lesser crime like *Vergehen*) was seen by the FCJ as disproportionate and hence violating even GDR laws if interpreted in a human-rights-friendly (read: correct) way. But when Schmidt's actions could no longer be classified as a felony, using gunfire against a harmless person such as himself was illegal – since § 27 (2) GrenzG permitted shots only prevent crimes which

[528] 'the will of the Führer'.
[529] '… der bloße Wille der Inhaber tatsächlicher Macht Recht zu schaffen vermochte.', Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [p. 148].
[530] Art. 6 and 12 ICCPR

'presented itself as a crime'. Using gunfire against Schmidt thus breached § 27 (2) of the border code was hence criminal in the view of the FCJ.

This thought concluded the courts' inquiry as to whether GDR law could plausibly justify the deadly shots in this case. The answer was 'no'. The defendants' actions had not been justified by the border law,[531] at least not by the border law as interpreted by the FCJ. Eventually, the FCJ concluded that no excuse for the defendants could be found in GDR law. They had still committed an illegal act of manslaughter – illegal, in the views of the court, according to GDR laws as they *should* have been interpreted at the time of the offence.

The Question of retroactive punishment[532]

The FCJ then addressed the problem of retroactive punishment. This paradigm is a complicated predicament in the adjudication of state crime. Its ancient Latin formula *nullum crimen, nulla poena sine lege* demonstrates its overriding significance for the evolution of European law out of ancient Roman law and the paradigm of legal predictability.[533] In short, this formula enshrines the prohibition of retroactive punishment: a deed can only be sentenced if it was defined as a crime at the time when it was carried out. This ancient paradigm has found ints way both into Germany's constitution and into the European Convention on Human Rights.[534] Its purpose is to protect citizens against arbitrary criminalisation. However, in post-conflict situations, the prohibition of retroactive punishment can become an obstacle to prosecuting former tyrants and their aides. The case of the GDR is a prime example of this, as state oppression did, arguably, not happen

[531] § 27 (2) GrenzG-DDR.
[532] For the following section, see Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, pp. 149-52.
[533] On the fundamental importance of legal predictability, see Mock, Erhard: *'Rechtssicherheit',* in: Staatslexikon der Görres-Gesellschaft, Vol. 4, 7th edition, Freiburg: Herder 1988, 731-733.
[534] Art. 103 (2) GG, Art. 6 ECHR.

against GDR law, but with its support or at least without opposition from the legal branch. At the same time, however, the constitutional protection from retroactive punishment was in place and had to be dealt with by courts adjudicating on former GDR officials.[535]

In contemplating the legal quandary of adjudicating the case at hand while also respecting *nulla poena,* the FCJ acknowledged that international tribunals such as the Nuremberg Trials after World War II had weakened the principle. This development, the FCJ claimed, had taken place under strong influence of Anglo-Saxon jurisprudence in these trials. German jurisprudence, however, had not adopted these developments in the post-war years. The court also noted that international law, most notably the ECHR [536] and the ICCPR [537] prohibited retroactive punishment as well.

However, both international regulations also account for acts which at their time violated the 'general principles' of law as acknowledged by a wide range of states. While this could, generally speaking, be interpreted as a clause permitting criminal

[535] For this section, see Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, section 'C', II, 4.

[536] Art. 6 ECHR reads: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

[537] Art. 15 of the ICCPR reads: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'

prosecution of state crime after the end of tyrannies or wars, the FCJ reiterated that these international regulations still had to be subjected to the prohibition of retroactive punishment in (West) Germany's constitution, which enjoys primacy over international law in the country's domestic legal order. This limitation of those two international treaties was also made clear when West Germany's Federal Government submitted a reservation to Art. 7 (2) ECHR when ratifying the document in 1954, clearly stating that it could only be applied within the boundaries of Art. 103 (2) GG, the Basic Law's prohibition of retroactive punishment.[538] In doing so, the Federal Republic followed an established practice of national governments by which they can limit the application of international treaties on their country.

However, in the case at hand, the FCJ concluded that the conviction of Walther and Hapke did not violate the prohibition of retroactive punishment. It recounted that, for a punishment to be legal under the Basic Law's regulations, the punishability had to be determined in legislation.[539] In this particular case, the FCJ claimed that the punishability of the acts in question had been regulated by GDR laws, which the defendants had breached. Because the law at the time when the fatal shots were carried out *could have been* read in a way as to prohibit the deeds in question, this legal interpretation of the law meant that the punishability had been established in legislation. In summary: As GDR law had already criminalised those fatal shots, this trial could not violate the constitutional protection.

Naturally, however, one could argue that state practice *at the time* did not criminalise the fatal shots and therefore, the FCJ had just been retrofitting GDR law in hindsight. The FCJ acknowledged that, but crucially stated that:

[538] Bgbl. 1954 II, p. 14.

[539] Art. 103 (2) reads: 'An act may be punished only if it was defined by a law as a criminal offence before the act was committed.' ('Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde.')

> '[t]he expectation that the law will, as in state practice at the time of the offence, also be applied in the future in such a way that a justification contrary to human rights will be recognised, is not worthy of protection.'[540]

So, in conclusion, the FCJ ruled that no justification could be found in GDR law, and that the Schmidt case did not violate the prohibition of retroactive punishment.[541]

Individual Guilt and Appropriate Sentences[542]

After confirming the *Landgericht's* ruling that Hapke and Walther had killed Schmidt with conditional intent, the FCJ also paid tribute to years of indoctrination, thereby criticising the earlier judgement: 'in the light of the defendants' life and environment, it appears inappropriate to reproach them for convenience, legal blindness, and the renunciation of one's own thinking'.[543] However, the court confirmed the *Landgericht's* assessment that even for an 'indoctrinated person', it was 'obvious' that killing an 'innocent' person with continuous fire violated any 'elementary killing ban'.[544]

In a final statement on the mild sentences, the court made some important assertions on the pyramid of responsibility of GDR officials for the border regime. It stated that neither the defendants' training in manual labour nor their school education could have promoted their ability of critical thinking. Moreover, they had been 'at the bottom' of military hierarchy. Hence, 'in a way, they are also victims

---

[540] 'Die Erwartung, das Recht werde, wie in der Staatspraxis zur Tatzeit, auch in Zukunft so angewandt werden, daß ein menschenrechtswidriger (!) Rechtfertigungsgrund anerkannt wird, ist nicht schutzwürdig.' Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [p.151].

[541] ibid., p. 151f.

[542] For this section, see ibid., pp. 152-55.

[543] 'Bequemlichkeit, Rechtsblindheit und Verzicht auf eigenes Denken', ibid., p. 154.

[544] 'offensichtlich', 'einen indoktrinierten Menschen', 'unschuldig', 'elementares Tötungsverbot', ibid.

of the conditions associated with this border'.[545] Also, the court claimed it had to be acknowledged that functionaries had not been able to be brought before courts.

The FCJ's ruling in the second *Mauerschützen* Verdict

The pending appeal judgement in the Gueffroy case gave the FCJ to specify and reaffirm its stance on the border guard cases.[546] The high court acquitted Kühnpast and ordered Berlin's *Landgericht* to assess the level of penalty for Heinrich again. Eventually, Heinrich was sentenced to a suspended prison sentence of two years.[547] As for Kühnpast's acquittal, the FCJ argued that he had 'repeatedly' appeared to be 'receptive to the call of his conscience' and it could not be ruled out that he had voluntarily missed the victims.[548]

This decision enabled the court to strengthen wide parts of its first border guard decision in way as to increase its potential as key precedent. Other than the regional court's verdict in the Gueffroy case, the FCJ recognised that an order to shoot and, if necessary, kill fugitives to prevent escapes had indeed existed. Coming to this conclusion, the court showed sensitivity for the actual state practice at the border. Commendations and distinctions which were awarded to Heinrich, Kühnpast, Schmidt and Schmett were seen as an indication that the death of fugitives was at least tolerated, if not intended. Therefore, even though a written order to kill fugitives had not been found, the court accepted it had existed. Moverover, the lack of any criminal proceedings against the guards were seen as pointing into the same

[545] ibid., p. 155.
[546] Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86.
[547] Erneutes tatrichterliches Urteil des Landgerichts Berlin vom 14.3.1994, Aζ. (527) 2 Js 48/90 Ks (3/93), in: Marxen, Klaus / Werle, Gerhard (eds): Strafjustiz und DDR-Unrecht. Dokumentation, Berlin: De Gruyter 2002, pp. 89-101.
[548] '…empfänglich für den Anruf seines Gewissens…' Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86, [p. 76].

direction.[549] The court thus accepted that preventing escapes even at the price of killing a fugitive was a clear order of the superiors, thereby differing from the judgement of the regional court, while confirming the assumption of the initial verdict in the Schmidt case. A mixture of written orders, subliminal suggestions, and actions like commendations had to be understood as a part of an 'influence aimed at creating obedience.'[550]

The assumed existence of such an order led the court to assert that Heinrich was at the 'very bottom' of the military hierarchy and to an extent also a victim of the border regime'.[551] Also, it had to be noted that 'those who have deformed the legal consciousness of border guards in schools, mass organisations and political education cannot be held responsible due to a lack of relevant criminal offences.'[552] The FCJ also reacted to a discussion which had emerged in the previous months and would continue for years: why subordinates would be sentenced while leaders remained uncharged or not convicted.[553] The FCJ noted that '[f]or reasons beyond [H.s'] control, officials with a greater overview and more differentiated training have not yet been held accountable.'[554] Therefore, despite upholding the conviction of Heinrich for criminally killing Gueffroy with conditional intent, the court

[549] Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86, [pp. 78f.].

[550] '…einer insgesamt auf Gehorsam zielenden Einflussnahme.', ibid., 82.

[551] 'Ganz unten', 'Er ist in gewisser Weise auch Opfer des Grenzregimes gewesen.' , ibid., 85.

[552] ibid.

[553] See the debate about the opening of the NVR case as well as the parliamentary debate in chapter 3.

[554] '„Aus Gründen, die er nicht zu vertreten hat, sind Funktionsträger, die über einen größeren Überblick und über eine differenziertere Ausbildung verfügten, bisher nicht zur Verantwortung gezogen worden.', Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86, [p. 85].

believed that his sentence needed to be milder. The competent *Landgericht* later accommodated this request (see infra).[555]

A final decisive ruling was made by the FCJ in ruling that acts 'grievous bodily harm' (§ 224 StGB, 'Gefährliche Körperverletzung') did not warrant a conviction. The FCJ dismissed the state prosecutor's appeal to convict Schmett and Schmidt of this. The high court accepted that those two defendants might have believed that shots at limbs had been warranted by the border code. In this case, they would have been subjected to an 'unavoidable ban of prohibition'[556] which protected them from prosecution.[557]

* * *

It is difficult to overestimate the significance of the FCJ's first two verdicts on the border guard cases. With these rulings, the court established a default line of jurisprudence for all future Border Guard Trials. As this chapter has demonstrated, the verdicts' legal reasoning was complex, multi-faceted, and took into account various legal sources.

The FCJ abandoned legal default opinions of the time of German division according to which *West German* law had criminalised fatal shots in the GDR. Instead, the FCJ advanced itself to the role of the authoritative interpreter of GDR law. It ruled that in a textual reading, the GDR border law permitted the use of gunfire to prevent escapes across the Berlin Wall or the Inner German border. However, the FCJ claimed that this textual reading of the law violated higher-ranking legal considerations.

---

[555] ibid., 77-85.

[556] § 17 StGB: 'unvermeidlicher Befehlsirrtum'.

[557] Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86, [p. 86].

According to the court, a permission of fatal shots against unarmed fugitives violated international human rights obligations which the GDR had entered into voluntarily. This was substantiated with articles 6 and 12 of the International Covenant on Civil and Political Rights (ICCPR), which guarantee a right to life and free movement, respectively. Moreover, the FCJ referred to the Radbruch Formula, a legal concept developed in the wake of the Holocaust. It holds that normally, positive law has to be respected, unless this becomes so utterly unacceptable, in which case positive law has to give way to supra-positive considerations of justice.

Once the FCJ had disregarded any justifications from GDR law, it embarked on a quest to interpret GDR law in a fashion that the court considered to be consistent with the country's own human rights obligations. Arguably, this endeavour presented a weak spot of the whole judgement, as the FCJ separated the pure text of the law from all societal and political context of its time. In such an interpretation, the FCJ identified a principle akin to the principle of proportionality enshrined in (West) German law. The FCJ still accepted that, in some cases, the law might have warranted the use of gunfire against fugitives. In this specific case at hand, however, it held that the will to prevent an escape of an obviously unarmed and hence harmless man could not be warranted by GDR law, if interpreted in accordance with human rights standards and the principle of proportionality. Therefore, and this was a striking finding, the court found that the GDR border regime had been illegal *even* under GDR law, *if only it had been interpreted correctly.*

Given that, in the court's reading, GDR law and not West German law criminalised the acts in question already at the time when they were committed, it saw no problem in the ancient legal paradigm and constitutional right of *nulla poena sine lege* – the prohibition of retroactive punishment. It stated that established GDR state practice to interpret the law 'wrongly' (that is, in a way as to warrant the shots) did not justify defendants' expectation that this 'false' interpretation would prevail

over time. Hence, the expectation to be spared from prosecution for theoretically illegal acts would not be protected by the right of *nulla poena.*

Finally, in assessing individual guilt of the defendants, the FCJ offered interesting contemplations of indoctrination and involvement, guilt and victimhood of those serving in the GDR border force. It accepted that the defendant's practical training and their growing up with the Berlin Wall in place did not encourage them to learn how to critically challenge their superiors' orders. 'In a way', the court concluded, '… they are also victims of the conditions associated with this border'.[558]

The court's line of reasoning is remarkable for taking the GDR seriously as a state bound to its own law. The FCJ thereby and explicitly distinguished the GDR from the 'Third Reich'. On the other hand, the reasoning is not entirely convincing. The derivation of a principle of proportionality, grounded in international human rights obligations, was a bold move of the FCJ. In the GDR's legal order, international law did only then receive direct effect for citizens when the Volkskammer adopted it. This had not happened with the ICCPR, as the regional court's decision in the Schmidt case had pointed out. Clarifying this is by no means a defence of socialist legal principles, as even in West German law, international obligations have to be converted into national law before they take effect. The FCJ's reasoning therefore marks an example of combining an abstract interpretation of legal principles with a hyper-textual reading of the border law. It appears to be highly doubtful how any defendant should have been able to force this legal situation in order not to commit criminal offences. Compared to this interpretation

[558] Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [p. 155].

of the legal situation, the initial verdict in the Gueffroy case which rejected the border regime as a whole on grounds of violations of fundamental legal principles appears more convincing and even more predictable to non-legally educated minds.

However, the FCJ's decision included some important remarks, especially for the public. The court's statement about missing trials against former elites as a reason for lowering Heinrich's sentence must be read as a reaction of the judges to intense public pressure on the judiciary to go after the likes of Erich Honecker. It was therefore also important that the court established that an actual order to shoot and, if necessary, kill had been handed down from the state and party leaders to the border guards. This assertion was a necessary prerequisite for lower courts to go after Erich Honecker, Erich Mielke, and other former leaders.

By the same token, describing Heinrich, Walther, and Hapke as victims too of the border regime, the FCJ attempted to do justice to the actual hierarchy of perpetrators and to account for the dilemma in which the courts found themselves: having to adjudicate on individual guilt in cases that were an expression of the Cold War. Not surprisingly, then, the court implicitly acknowledged the limits of the criminal law in adjudicating state crime when it stated that those who were responsible for propaganda could not be held accountable for their deeds in the absence of relevant provisions in the criminal law.

The FCJ's ruling was also groundbreaking in another respect. It essentially closed the door for criminal prosecution of acts of bodily injury at the Inner German border. In these cases, the FCJ acknowledged that the principle of legal security had to override the demand for justice. This was important for the FCJ's interpretative coherence in accepting the validity of GDR law and identifying killings as the one exception where legal positivism and legal security had to give way to fundamental considerations of justice.

The First High-Profile Case: The National Defence Council (NVR) Trial

The case against former members of the GDR's National Defence Council (*Nationaler Verteidigungsrat, NVR*) was the first trial against former GDR leaders for the killings at the Wall and at the Inner-German border. It was opened on 12 November 1992 and concluded on 16 September 1993. While the proceedings were opened merely two years after the fall of the Wall, it was, arguably, crucial that by then the first Border Guard Trials had been closed for nine months. Given the great extent of materials and cases considered in this trial, it is no suprise that it took prosecutors slightly longer to collect all relevant material. Also, this trial partially rested on the verdicts in the *Gueffroy* and *Schmidt* case and on their high court confirmations by the FCJ. These important precedents relieved the NVR case from answering the basic questions: could re-united Germany's courts adjudicate on state acts of the GDR? Had the border regime been warranted by the GDR law? However, as chapter 5 argues, this temporal sequence also contributed to an impression that 'small men be hanged', while elites be spared.

Senior figures like Defence Minister Heinz Keßler, his deputy Fritz Streletz (also Chief of Staff of the National Defence Army, NVA) and Hans Albrecht, head of the SED district of Suhl were among the defendants. However, the court also saw some of the most senior figures of the GDR in the dock: Erich Honecker (long-term head of state and SED boss), Willi Stoph (President of the Minister's Council) and Erich Mielke, notorious head of the Secret Service *Stasi*.[559] However, none of these three men could be convicted in the NVR case. On 12 January 1993, the case against Honecker had to be closed due to his poor health. This had been ordered by Berlin's Constitutional Court on that same day. Honecker, suffering from cancer, had to be released immediately and left Germany on that same day for Chile, where he lived until his death on 29 May 1994. Despite further attempts by state prosecutors, the

[559] Erstinstanzliches Urteil des Landgerichts Berlin vom 16.9.1993, Az. (527) 2 Js 26/90 Ks (10/92), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 502-598 [NVR case]

trial against Honecker was finally closed in April 1993. Further investigations against Honecker for abuse of trust and misappropriation of public funds also had to be dropped due to his health. His release sparked severe public outcry (see chapter 5).[560] Honecker died an innocent man, still riddled with guilt in the eyes of the public. The trial against Stoph also had to be closed for health reasons in July 1993. His health condition also prevented him from being charged for economic crimes.[561] The case against Mielke was temporarily closed in November 1992, as he was simultaneously tried for killing two police officers in Berlin's Bülowplatz in 1931. In this trial, he was convicted of manslaughter and was sentenced to six years in prison. The proceedings for killings at the border had to be finally closed in July 1998 due to Mielke's poor health. Other proceedings against him for misappropriation of public funds, inciting abuse of justice, and other crimes also had to be closed before Mielke could be convicted.[562]

Keßler and Streletz, however, could be convicted of inciting manslaughter after sixty-five court days in September 1993. Keßler received a prison sentence of seven years and six months, Streletz of five years and six months. Albrecht was convicted of aiding and abetting manslaughter and had to serve four and a half years in prison.[563] He had been previously convicted of misappropriating public funds as well as of illicit possession of firearms.[564] Initially, state prosecutors had charged the defendants with the killings or bodily injury in sixty-eight cases, but only twelve claims of manslaughter or murder were admitted by the judges. Keßler was charged in seven cases; Albrecht and Streletz in six. Like in the *Politbüro* case (see below), the judges provided a thorough investigation into the political system of the GDR,

[560] ibid., p. 595, note 5.
[561] ibid., note 4. See also Marxen/Werle, Strafjustiz, vol. 3, No. 7.
[562] Erstinstanzliches Urteil des Landgerichts Berlin vom 16.9.1993, Az. (527) 2 Js 26/90 Ks (10/92), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 502-598 [NVR case], pp. 595f.
[563] ibid., pp. 501f.
[564] ibid., p. 514.

portraying the SED's total claim to power and how the armed forces were influenced by, and interacted with, political organs. The chain of command was carefully reconstructed from the defendants' deliberations in the National Defence Council down to actual commands at the Berlin Wall and at the Inner-German border. It was made clear that the NVR's decision were authoritative for military orders.[565] In order to demonstrate individual responsibilities of Streletz, Keßler and Albrecht, the court demonstrated which military orders were taken at what point in time by the NVR, and how these were translated into orders of the day on the days of deadly events.[566] The deaths linked to the defendants had occured between 1971 and 1989. Klaus Seifert's death after stepping on a mine on 8 April 1971 was the oldest case. He was eighteen years old.[567] Hans-Friedrich Franck died on 17 January 1973 after causing the explosion of an explosive mine the day before. He was twenty-seven years old.[568] On 14 July 1974, twenty-six-year-old Wolfgang Vogler was seriously injured by an explosive mine in the Harz. He died the next day.[569] Wolfgang Bothe died from severe brain injury on 11 May 1980, after being injured by an explosive mine on 7 April of that year near Halberstadt. He was twenty-eight years old.[570] Frank Mater died on 22 March 1984 after being injured by an explosive mine near Mühlhausen.[571] The deaths of Horst-Michael Schmidt and Chris Gueffroy from gun fire (see above) were the final two cases with which the defendants were charged.[572]

The verdict provided insights into the practice of the border regime, albeit not as extensively as the *Politbüro* trial a few years later (see below). The structure of the border strip was depicted in great detail, as was the insufficient quality of the rifle in use, the AK-47 Kalashnikov rifle. During their shooting practice, they had to fire

[565] ibid., pp. 507-10.
[566] ibid., pp. 524-52.
[567] ibid., p. 547f.
[568] ibid., p. 548.
[569] ibid.
[570] ibid., 549.
[571] ibid., pp. 549f.
[572] ibid., pp. 550-52.

on targets in the shape of a human body. However, these targets fell over once hit anywhere. Hence, according to witness testimonies, most recruits fired on the target's trunk to ensure hitting the target. In practice, however, this way of shooting leads to significantly greater risks of killing than aiming for legs and feet. Moreover, judges heard that recruits were only trained for preventing illegal crossings from the GDR into the FRG, not the other way around, both in theory and in practice. And when border guards received their daily instructions during the *Vergatterung,* they were repeatedly told that if they fired on an individual *'Grenzverletzer'*, they should always claim that they had seen a further shadow of a person or a gun, or that a fugitive's motion towards a border guard could be understood as a direct attack on the guard. All these instructions, obviously, served to assure border guards that using lethal force was seen as legitimate and that the law could be bent, if need be.[573]

The court clearly identified what the defendants had known about the border regime. In the judges' view, the defendants had been aware that the border regime's primary purpose was to deter GDR citizens fleeing the GDR, even at the price of using weapons and explosive mines. They argued that the Streletz, Keßler and Albrecht had been aware that their work in the National Defence Council contributed to fugitives' death. However, they had been 'staunch' members of the SED 'who 'endorsed' the party's policies.[574] In coming to these conclusions, the files of the *ZESt* played no role, if the verdict's list of consulted evidence is exhausitve.[575]

As in all related cases, the regional court then had to assess if West or East German criminal law was milder. As usually in these cases, West German law was milder with respect to sentences. The important question, however, was if East German law would provide any justifications for the acts in question. In the cases of those border guards who carried out fatal shots, the decision was: no. How would

[573] ibid., pp. 514-20.
[574] 'überzeugte Mitglieder', 'gutgeheißen und getragen', ibid., pp. 553f.
[575] ibid., 554-71.

the court answer this question with respect to former military leaders of the GDR? In short: no, justifications could not be found. Regarding the legality of lethal shots, the court could point to the FCJ's decisions in the *Gueffroy* and *Schmidt* cases (see above). Explosive mines and self-firing devices, which were basically the same, were a different question. Here, the court concluded that their use was not even warranted by the border law. Moreover, other than the use of rifles, mines were described as killing randomly: 'The mine does not differentiate between different victims, it rather detonates automatically as soon as it is triggered – by whomever.'[576] That referred especially to women and children who were not to be fired at, according to § 27 (4) d) of the Border Law. The court therefore believes that under GDR law, the defendants were culpable of instigating murder, which would result in a sentence of ten to fifteen years. Under West German law, their acts were classified as instigating manslaughter, resulting in penalties between five and fifteen years.[577] After accepting a series of mitigating circumstances for all three defendants, they were convicted of instigating manslaughter and sentenced to the aforementioned prison terms, not without noting a series of mitigating circumstances which spoke in favour of the defendants: the fact that they were part of a system, their helpfulness during the trial or, in Keßler's case, his attempt to replace lethal explosive mines with non-lethal weapons.[578]

The Federal Court of Justice confirmed the ruling in July 1994, albeit with symbolically important modifications. Berlin's regional court had convicted the defendants merely of 'instigating' manslaughter. The FCJ, however, ruled that they had to be seen as 'indirect perpetrator'. This was in line with the remarks in the FCJ's *Gueffroy* and *Schmidt* judgements where it had claimed that the border guards had not been 'the real culprits'. It was, therefore, only logical that those who bore political and military responsibility for the deaths at the Wall be also considered as

[576] 'Die Mine differenziert nicht zwischen verschiedenen Opfern, sie detoniert vielmehr automatisch, sobald sie – durch wen auch immer – ausgelöst wird.', ibid., p. 579.
[577] ibid., pp. 573-89.
[578] ibid., 589-84.

actual perpetrators. This was widely acknowledged by the press (see chapter 5).[579] In Albrecht's case, this meant that this sentence had to be increased to five years and one months in prison.[580]

The Federal Constitutional Court's Confirmation in 1996

It was only a matter of time until Germany's highest court would become involved in the Border Guard Trials. The Federal Constitutional Court (FCC) in Karlsruhe is Germany's highest court. No court of appeal can revise or dismiss its judgements. However, other than the U.S. Supreme Court or the Supreme Court of the United Kingdom, it has limited jurisdiction. Its only task is to rule on whether individual constitutional rights have been infringed upon, or if certain state acts have curtailed competences of other branches of the state. It is also the only court which is competent to prohibit and dissolve political parties. It is, however, not a supreme court in the sense that it could revise judgements for reasons of substance, except when constitutional rights have been violated. Still, 'going to Karlsruhe' has become a regular feature not only in trials, but also in political conflicts.

In the case of the Border Guard Trials, the FCC was called upon to decide if the conviction of border guards and their superiors violated the prohibition of retroactive punishment (*nulla poena)* that is enshrined in Art. 103 (2) of the Basic Law. As has been shown above, the FCJ had argued that in rare cases of state crime, legal certainty had to yield to 'material justice' and that in this cases, the prohibtion of retroactive punishment could be weakened. Of course, the FCC could have taken a completely different view. But it did not.

Instead, the judges overcame what seemed like a contradiction in itself: upholding the prohibition of retroactive punishment as 'absolute', whilst at the same

[579] Revisionsurteil des Bundesgerichtshofs vom 26.7.1994, Az. 5 StR 98/94, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 598-607.
[580] ibid., pp. 606f.

time restricting its unconditionality.[581] This became obvious in the structure of the judgement's guideline (*Leitsätze*), a summary usually prepended to the main judgement. Here, the FCC started out by stating that the prohibition of retroactive punishment was 'absolute' and needed to be 'strictly formalised'. It added that the 'strict' principle was justified by the 'special basis of trust which the criminal laws bear if they are enacted by a democratic legislature bound by fundamental rights'.[582] This basis of trust was missing, the court argues, if rulers excluded 'the gravest criminal injustice' from culpable liability. Therefore, if they invited or encouraged acts which 'disdained (…) universally acknowledged human rights in a grave way', the protection of legal predictability had to yield.[583]

The court subsequently dismissed the constitutional complaints of Hans Albrecht, former head of the SED district of Suhl, Defence Minister Heinz Keßler, his deputy Fritz Streletz and a fourth unnamed person. In line with previous judgements, it held that the plaintiffs had not enjoyed any immunity which could protect them from criminal liability.[584] Most importantly, however, the court explained comprehensively its ruling – namely, why *nulla poena* had not been violated. Like in the guidelines, the FCC clearly stated that the prohibition of retroactive punishment enshrined in Art. 103 (2) of the Basic Law was 'absolute'. It was described as a 'manifestation of the rule of law'.[585] However, the rule of law

[581] Beschluss des Bundesverfassungsgerichts vom 24.10.1996, Az. 2 BvR 1851/94; 2 BvR 1852/94; 2 BvR 1853/94; 2 BvR 1875/94, in: Marxen/Werle, Strafjustiz, vol. 2, sub-vol. 2, pp. 608-641.

[582] 'Das strikte Rückwirkungsverbot des Art. 103 Abs. 2 GG findet seine rechtsstaatliche Rechtfertigung in der besonderen Vertrauensgrundlage, welche die Strafgesetze tra- gen, wenn sie von einem an die Grundrechte gebundenen demokratischen Gesetzgeber erlassen werden.', ibid., p. 609.

[583] 'An einer solchen besonderen Vertrauensgrundlage fehlt es, wenn der Träger der Staatsmacht für den Bereich schwersten kriminellen Unrechts die Strafbarkeit durch Rechtfertigungsgründe ausschließt, indem er über die geschriebenen Normen hinaus zu solchem Unrecht auffordert, es begünstigt und so die in der Völkerrechtsgemein- schaft allgemein anerkannten Menschenrechte in schwerwiegender Weise mißachtet. Der strikte Schutz von Vertrauen durch Art. 103 Abs. 2 GG muß dann zurücktreten.', ibid.

[584] ibid., p. 630f.

[585] 'Ausprägung des Rechtsstaatsprinzips', ibid., p. 632.

also included 'the demand for material [or elementary, P.E.] justice as one of its guiding principles'.[586] The FCC went on to argue that the criminal law restricted in this way would usually be used 'under the conditions of democracy, separation of powers and a commitment to fundamental rights'.[587] However, the judges went on, this 'special basis of trust' was absent when a government circumvented positive law in order to 'invite or encourage' crimes of the gravest kind which 'disdained (…) universally acknowledged human rights in a grave way', the protection of legal predictability had to yield to 'material justice.[588] The Court likened the case at hand with similar conflicts in the adjudication on Nazi crimes and referred to the Radbruch Formula by stating the time of Nazi rule had shown that 'the legislature can legislate grave "wrong"' which could not command any 'obedience' if it was in 'intolerable opposition to justice'.[589] This instance of doing the splits, legally speaking, was decisive for forming the subsequent legal landscape.

It is difficult to overestimate the significance of this judgement for the whole development of criminal trials against former GDR officials, especially for the Border Guard Trials. The FCJ's verdicts were crucial for the establishment of a legally watertight approach that could (and subsequently did) serve as a template for the adjudication of similar cases. But it was not until the FCC's judgement in 1996 that it was clear that the whole project of judicial *Aufarbeitung* would not fail.

---

[586] 'Das Rechtsstaatsprinzip umfaßt als eine der Leitideen des Grundgesetzes aber auch die Forderung nach materieller Gerechtigkeit', ibid.

[587] 'unter den Bedingungen der Demokratie, der Gewaltenteilung und der Verpflichtung auf die Grundrechte', ibid., p. 633.

[588] 'Diese besondere Vertrauensgrundlage entfällt, wenn der andere Staat für den Bereich schwersten kriminellen Unrechts zwar Straftatbestände normiert, aber die Strafbarkeit gleich- wohl durch Rechtfertigungsgründe für Teilbereiche ausgeschlossen hatte, indem er über die geschriebenen Normen hinaus zu solchem Unrecht aufforderte, es begünstigte und so die in der Völkerrechtsgemeinschaft allgemein anerkannten Menschenrechte in schwerwiegender Weise mißachtete. Hierdurch setzte der Träger der Staatsmacht ex- tremes staatliches Unrecht, das sich nur solange behaupten kann, wie die dafür verant- wortliche Staatsmacht faktisch besteht.', 'materielle Gerechtigkeit', ibid., pp. 633f.

[589] '(…)daß der Gesetzgeber schweres "Unrecht" setzen könne (…) und deshalb einer Norm wegen unerträglichen Widerspruchs zur Gerechtigkeit von Anfang an der Gehorsam zu versagen sei.', ibid., p. 634.

In future cases, such as the *Politbüro* trial, judges, prosecutors, defendants, and lawyers knew that the legal basis for the proceedings had been manifested.

The *Politbüro* Trial, January – August 1997

With more than 110 days of trial between 15 January and 25 August 1997, the *Politbüro* trial agaist Egon Krenz, Günter Schabowski and Günther Kleiber was one of the longest, if not the single longest, trial against GDR officials. Eventually, Schabowski and Kleiber were convicted of minor manslaughter in three cases (minderschwerer Fall des Toschlag, § 213 StGB) and were sentenced to three years in prison. Krenz was convicted of manslaughter in four cases and received a prison sentence of six and a half years.[590]

Other than in previous cases, the judges in this case could rely on established jurisprudence. However, they also provided extensive findings about the way how state institutions and politicians in the GDR interacted. On almost fifty pages, the verdict considered the 'power structures' within the GDR.[591] Another fifty pages were spent on the study of the responsibility of the SED's *Politbüro* for the GDR's border regime.[592] For the court's assessment of evidence to be printed, more than 100 pages were needed. The list of witnesses included such high-ranking former GDR officials as Heinz Keßler (Minister of Defence) and his deputy Fritz Streletz. Moreover, a former clerk of the *Politbüro* was heard, a long with Erich Honecker's long time secretary and consultant. What is more, other low-ranking members of the SED's central committee were questioned, along with 'candidates' to the *Politbüro,* that is, prospective members. With former officers of the border troops, including their head *Generaloberst* Klaus-Dieter Baumgarten, who had been convicted of manslaughter in eleven cases and sentenced to six and a half years in

[590] Erstinstanzliches Urteil des Landgerichts Berlin, 25.8.1997, Az. (527) 25/2 Js 20/92 Ks (1/95), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 645-890, [p. 645].
[591] 'Machtstrukturen', ibid., pp. 654-711.
[592] ibid., pp. 712-759.

prison in 1996.[593]

In its verdict, the court described the international political situation and extensively studied structures of the SED and of the GDR's public administration. For example, the verdict asserted that:

> 'Every citizen of the GDR was exposed to complex, systematic, and recurring political paternalism and manipulation by the political organs of the SED, which began in kindergarten and accompanied them through school and into professional life. An essential instrument in this was the so-called political education [*Politunterricht*]'.[594]

It also made clear how the SED's *Politbüro* decisions were central to any staffing decisions in public positions, even though in the GDR's parliament, the People's Chamber, the SED only had 127 seats out of 500.[595] In setting out how key SED politicians also occupied all other important offices of state, the verdict made plain how inextricably the party was intertwined with all areas of politics and public life in the GDR. For example, the Secretary-General of the SED's Central Committee was also head of the National Defence Council and head of the Council of State (*Staatsrat*), the collective body that was the country's head of state. Moreover, the National Defence Council was solely staffed with SED members. In 1989, of seventeen members of the Council, twelve were also members of the SED's *Politbüro,* including two of the defendants in this case: Egon Krenz and Günter Kleiber.[596] This all served to say that the SED – and most importantly its steering committee, the *Politbüro* – were the real centre of power in the GDR, and all other

[593] Urteil des Landgerichts Berlin vom 10.9.1996 – Az. (536) 26/2 Js 15/92 Ks (2/95).
[594] 'Jeder Bürger der DDR war einer komplexen, systematischen und wiederkehrenden politischen Bevormundung und Manipulierung durch die Politorgane der SED ausgesetzt, die im Kindergarten begann und ihn über die Schule bis in das Berufsleben begleitete. Wesentliches Instrument hierbei war der sogenannte Politunterricht.', Erstinstanzliches Urteil des Landgerichts Berlin, 25.8.1997, Az. (527) 25/2 Js 20/92 Ks (1/95), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 645-890, [p. 665].
[595] ibid., pp. 667f.
[596] ibid., pp. 667-76.

institutions gravitated around it. Therefore, the *Politbüro's* resolution of 14 January 1958 was important for army and border troops. It stated that '[e]very commander, every superior must be aware that he is first and foremost a political functionary and carries out his work on behalf of the Party of the Working Class'.[597]

In line with this detailed historical scrutiny, the judges also reconstructed the chain of command from the top political leadership down to border guards at the bottom of the hierarchy. Annually, the National Defense Minister issued the 'Order No. 101' for the border troops. Their head transformed this order into an 'Order No. 80' for the three border commandos. This was translated into 'Order No. 40' for the border regiments, which again subsequently issued 'Orders No. 20' which were translated into the daily *Vergatterung.* The court argued that 'all acts' of the border troops, including the use of firearms against fugitives, were 'based on this chain of command'.[598] This assertion was crucial for the verdict and the bigger project of holding political leaders to account, as it proved their responsibility for the acts in question.

The regional court also attempted to disprove claims that the GDR's border regime resembled West German state practice, a claim repeatedly made by the defendants. For instance, it argued that the spring-guns installed at the Inner German border fence were purely meant for harming those who crossed the border from East to West and had not military purpose. Moreover, since they could be seen from the West and since no signal wire was installed on the Western side of the border, the court assumed that it did not aim at protecting the border from Western invasions. Likewise, during shooting practice, future border guards were merely trained to hit a target in the shape of a human being. They were not specifically trained to cause non-life-threatening wounds. From this, and from further remarks on the legal situation, on the indoctrination of recruits and from standing

[597] 'Jeder Kommandeur, jeder Vorgesetzte muß sich bewußt sein, daß er in erster Linie politischer Funktionär ist und seine Arbeit im Auftrag der Partei der Arbeiterklasse durchführt.', ibid., p. 682.
[598] 'Sämtliche Handlungen (…) beruhten auf dieser Befehlskette.', ibid., p. 685.

commands, the court derived that killings of fugitives were at least accepted, as the weapons and strategies used were able to inflict incalcuable damage to fugitives.[599]

The judgement also tried to refute claims that GDR leaders had no knowledge of the border practice. The verdict set out that any casualties at the Wall or border were immediately reported to the Defence Minister and the Secretary-General of the SED's Central Committee. [600] These senior figures were not as helpless as they occasionally claimed. For instance, the court argued that Honecker adhered to the removal of spring-guns in 1984 and 1985, despite criticisim from the USSR.[601] Likewise, after Gueffroy's death in February 1989, Krenz demonstrated his willingness and ability to change the border regime, despite being only deputy to Honecker. On 3 April 1989, Krenz ordered the chief of the border troops that in future, firearms could strictly only be used when self-defence required this.[602] The court credited Krenz for his actions, but also interpreted them as evidence that it was not impossible for the defendants to change the practice at the border.

To establish the defendants' guilt, the court carefully traced the genesis of commands for the border regime. Subsequently, the judges (re-)constructed a chain of command from general *Politbüro* commands to specific commands given to individual border guards on the day of a fatal shooting. For example, the court depicted a decision of the National Defence Council of 2 February 1984 to keep the border commands unchanged. The judges then traced this order through the chain of commands and concluded: 'As a result of these decisions, 20-year-old Michael-Horst Schmidt was killed in the early morning hours of 1 December 1984 by shots fired by border guards.'[603] Even though state prosecutors had submitted some dozens of cases to the court, the chamber deduced the defendants' guilt only in four

[599] ibid., p. 687-700.
[600] ibid., p. 705.
[601] ibid., p. 688.
[602] ibid., pp. 706-09.
[603] 'Infolge dieser Entscheidungen wurde in den frühen Morgenstunden des 1. Dezember 1984 der 20 Jahre alte Michael-Horst Schmidt durch Schüsse von Grenzsoldaten getötet', ibid., p. 724.

cases: in the above-mentioned *Schmidt* case, in the case of Michael Bittner's death on 24 November 1986,[604] Lutz Schmidt's death on 12 February 1987,[605] and lastly in the case of Chris Gueffroy.[606]

The court checked the acts in question both under East German law and under West German law, as the TGR mandated. In the light of the jurisprudence established in previous cases, including the NVR-case, this was no significant challenge. The court found that under GDR law, the defendants had incited murder (§112 [1] StGB-DDR. It claimed that without the *Politbüro's* resolutions, neither the chain of commands nor the daily *Vergatterung* had existed which eventually led to the deaths in question. This would have resulted in prison sentences of ten to fifteen years.[607] Under West German law, they were find guilty of manslaughter (*Totschlag*) or manslaughter in a minor case (*minderschwerer Fall des Totschlags*), respectively. Following the FCJ's revision judgement in the NVR-case, they were classified as indirect perpetrators, not merely as institgators. Still, West German law was milder and the defendants were hence convicted according to it.

In the case of all three defendants, the court chose relatively mild sentences. Krenz received a prison sentence six and a half years, made up of two years for the death of Michael-Horst Schmidt in 1984 (by the National Defence Council's decision of 2 February 1984) and six years for the killings of Michael Bittner, Lutz Schmidt and Chris Gueffroy (by the National Defence Council's decision of 25 January 1985). These sentences were combined and reduced for mitigating circumstances.[608] The judges credited him for trying to reduce killings at the border by ramping up the *Hinterland* wall. The court also accepted his testimony that the killings of fugitives had been his 'personal defeat in life'.[609] Moreover, the chamber

[604] ibid., pp. 733-35.
[605] ibid., pp. 737-39.
[606] ibid., pp. 740f.
[607] ibid., pp. 872-77.
[608] ibid., V., p. 883f.
[609] 'persönliche Lebensniederlage', ibid., V., p. 883.

acknowledged as mitigating that Krenz had adhered to his policy of reducing the use of firearm until he became Secretary-General of the SED's Central Committee (ZK) in autumn 1989. After that, he had prohibitied the use of firearms at the border save in cases of self-defence. Lastly, the court credited Krenz with his 'non-violent behaviour', aimed at finding 'political solutions' during autumn 1989. This had had a 'significant' effect on the level of his penalty.[610]

Likewise, the judges identified extenuating circumstances for Schabowski who had received three years in prison. The court credited him with precipitating the overthrow of Honecker 'conspiratorially [with Krenz] and at personal risk', which had paved the way for the 'easing and abolition' of the border regime. The court believed he played 'a major role in the peaceful course of the "Wende"'.[611] The chamber finally acknowledged a further series of mitigating circumstances in favour of all three defendants. It argued that the defendants had been involved in a 'totalitarian machinery of power' and that their 'room for manoeuvre' had been limited. [612] Moreover, it was argued in their favour that they had merely 'perpetuated' – not erected – the border regime.[613] Lastly, the court acknowledged that they had precipitated the killings not for 'selfish' reasons, but for 'misconceived public interest'.[614] Kleiber was therefore also sentenced to three years in prison.[615]

The Federal Court of Justice entirely confirmed the regional court's decision on

---

[610] ibid., p. 883f.

[611] 'Dem Angeklagten Schabowski war auch zugute zu halten, daß er im Herbst 1989 gemeinsam mit dem Angeklagten Krenz den Sturz Erich Honeckers konspirativ und unter Gefährdung seiner eigenen Person herbeigeführt und damit den Weg zur Lockerung und Abschaffung des Grenzregimes eingeschlagen hat. Er wirkte maßgeblich an [der] Öffnung der Mauer am 9. November 1989 mit. An dem friedlichen Verlauf der "Wende" hatte er wesentlichen Anteil.', ibid., p. 883.

[612] 'totalitärer Machtapparat', 'Handlungsspielraum' ibid., p. 880-82.

[613] 'fortgeschrieben', ibid., p. 882.

[614] '(…) daß sie nicht aus eigennützigen Motiven gehandelt haben, sondern in einem – allerdings falsch verstandenen – staatlichen Interesse. Ihnen ging es nicht darum, Menschen zu töten, sondern das Grenzsicherungssystem so unüberwindlich wie möglich zu erhalten.' ibid., p. 882.

[615] ibid., p. 882.

8 November 1999, remarkably one day before the tenth anniversary of the fall of the Berlin Wall.[616] Krenz also applied to the Federal Constitutional Court, arguing that his conviction had violated the prohibition of retroactive punishment (Art. 103 [2] Basic Law). The FCC rejected to hear the case, referring to its previous judgements on the legality of the border guard cases. This was the end of Krenz's journey through Germany's judicial appeals process.[617]

The European Court of Human Rights in Strasbourg

After the appeal to the FCJ had been lost and Krenz's complaint to the FCC had been to dismissed, three former senior figures of the GDR decided to puruse their last chance: to apply to the European Court of Human Rights (ECtHR) in Strasbourg. Former Defence Minister Heinz Keßler, his deputy Fritz Streletz and former head of state and government, Egon Krenz, claimed the Federal Republic had broken international law, that is, the European Convention on Human Rights (ECHR), by convicting them of manslaughter.

The ECHR is an international treaty between the member states of the Council of Europe. It was drafted in the aftermath of World War II and has become one of the first and most progressive international human rights instruments in the world. Under the convention system, states are obliged to guarantee the fundamental rights and freedoms laid down in the convention. Citizens and companies of member states can apply to the ECtHR if they believe that their rights have been infringed upon by a member state. However, this is only possible once all domestic legal remedies have been exhausted.[618]

---

[616] Revisionsurteil des Bundesgerichtshofs vom 8.11.1999, Az. 5 StR 632/98, in: Marxen/Werle, Strafjustiz, vol. 2, sub-vol. 2, pp. 890-909.

[617] Beschluss (Nichtannahme der Verfassungsbeschwerde) des Bundesverfassungsgerichts vom 12.1.2000, Az. 2 BvQ 60/99, 2 BvR 2414/99, in: Marxen/Werle, Strafjustiz, vol. 2, sub-vol. 2, pp. 910-13.

[618] Frowein, Jochen Abr.: *'European Convention on Human Rights (1950)'* in: Bernhardt, Rudolf (ed.): Encyclopedia of Public International Law, Vol. II, Amsterdam et al.: Elsevier 1995, pp.188-

The only way that Keßler, Streletz and Krenz could apply to the ECtHR was to claim that their conviction had violated fundamental rights laid down in the ECHR. They claimed that their convictions had violated the prohibition of retroactive punishment. This was not only protected in the German constitution (see above), but also in Art. 7 ECHR. This provision reads:

> '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

Paragraph 1 of this article is bascially in line with the prohibition of retroactive punishment that is also guaranteed in Germany's Basic Law. Paragraph 2, however, goes beyond the regulations of the German constitution in allowing for criminal prosecution of grave violations of *ius cogens*, that is, the most fundamental principles of international law. This usually includes genocide, slavery, and other acts that would be considered a severe violation of human rights. When acceeding to the Council of Europe in 1950, the FRG also became a party to the ECHR. In the instrument of ratification, the Federal Government, however, submitted a reservation that paragraph 2 of Art. 7 could only be applied in so far as it would not violate the protection against punishment without law in West Germany's constitution. That is to say that (West) Germany's prohibition of retroactive punishment even goes beyond the level of protection offered by the ECHR.[619]

96; Mowbray, Alastair: Cases, Materials, and Commentary on the European Convention on Human Rights, Oxford et al.: Oxford University Press [3]2012.

[619] European Court of Human Rights: Case of Streletz, Keßler and Krenz v. Germany (Applications nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 914-37, § 45. The verdict is also onlince assesible at

The applicants (as the defendants were now correctly referred to, being the parties who applied to the court) claimed that the acts for which they had been sentenced had not been defined as crimes in the GDR's penal code at the time when the acts were committed. Therefore, the applicants believed that their conviction violated the prohibition of retroactive punishment. Germany's Federal Constitutional Court had already dismissed the same claim, but from the point of view of the defendants, the application to the ECtHR at least offered another chance to appeal against their sentences. They also claimed that the border regime had been 'essential' for the preservation of the GDR and that their conviction was – in the words of the court – an *'ex post facto* interpretation of the GDR's criminal law' which reflected not so much a gradual change in the application and interpretation of the law, but a total refusal to accept any justifications for the acts in question that could be found in GDR law.[620] Defending the FCC's ruling and the previous courts' convictions, Germany's Federal Government rejected the applicants' claims and contended that it had been perfectly forseeable to the defendants that in the case of a regime change within the GDR, their acts would be prosecuted.[621] In their argument, the Federal Government played down the question of whether the ICCPR had been transposed into GDR domestic law or not; this had been a weak spot in the FCJ's ruling, and the Government – or their lawyers – seemed to tacitly acknowledge this.

The ECtHR's chamber noted that the case at hand was not an 'ordinary' criminal case, but had a 'special feature' in dealing with the 'transition between two states goverened by two different legal systems'.[622] By acknowledging this, the chamber

<https://hudoc.echr.coe.int/eng#{"fulltext":["Krenz"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-59353"]}>, last access: 11 September 2019.

[620] European Court of Human Rights: Case of Streletz, Keßler and Krenz v. Germany (Applications nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 914-37, § 47.

[621] ibid., § 48.

[622] ibid., § 52.

explicitly acknowledged the political dimension of the case. Still, it followed the line of argument of German courts in assuming that the principle of proportionality and the obligation to preserve human life had been enshrined in GDR statutory and constitutional law.[623] The court then considered the GDR's state practice and also took into account that the GDR had understandable reasons for protecting its border vigorously as its very existence had been 'threatened by the massive exodus of its own population'.[624] However, the chamber argued that the legal and constitutional priniples as well as the international view of the right to life as 'the supreme value in the hierarchy of human rights' should have been superior to these considerations. [625] The *Schießbefehl,* along with anti-personnell mines and automatic-fire systems were described as 'flagrantly' infringing 'the fundamental rights enshrined' in the GDR constitution.[626] In making the case as to why the applicants bore personal and criminal responsbility, the chamber also referred to § 95 of the GDR's criminal code which provided that those who were responsible for violations of human or fundamental rights should be held criminally responsible, irrespective of statutory law. As to the difference between state practice and positive law, the court claimed that the applicants could not refer to state practice as an indicator for the correct legal understanding of the time, as they had been those who had been responsible for state practice. Thus, no justification could be derived from their own practice.[627]

Interestingly, the ECtHR made ample reference to other post-socialist transformations in its judgement and to predicaments usually faced by transformative processes. It thus argued that it was 'legitimate' for a 'state goverend by the rule of law' to prosecute former regime perpetrators. For this sake, it was also

[623] ibid., § 61.
[624] ibid., § 71.
[625] ibid., § 72.
[626] ibid., § 73.
[627] ibid., §§ 75-78.

allowed to re-interpret historic law in the light of the rule of law.[628] State practices such as the GDR's border regime, the court continued, 'which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights' could not be protected by the ECHR.[629] In the judges' view, as leaders of the GDR, the applicants had 'created the appearance of legality emanating from the GDR's legal system but then implemented or continued a practice which flagrantly disregarded the very principles of that system'. In this light, protecting them from punishment would undermine the ECHR's purpose, namely 'to ensure that no one is subjected to arbitrary prosecution, conviction or punishment.'[630] With this remark, the Strasbourg court favoured 'material justice', to quote the FCC, over procedural accuratesse, thereby reflecting a more politicised approach of adjudication than German courts would normally do.

The ECtHR therefore concluded that the applicants' convictions did not violate the ECHR, as the punishability of the acts in question had not been determined retroactively. In a final statement, the court even touched upon the question of whether the acts had constituted crimes against humanity but refrained from pondering this idea any further as the questions of the case could be answered otherwise.[631]

The idea of judging the GDR border regime not on the grounds of positive law, but on the basis of higher legal considerations, that is, supra-positive law, was also prevalent in the three concurring judgements submitted by judges.[632] Judge Egils Levits made a strong case for understanding the law in authoritarian systems as part of the ruling system. He argued that the 'interpretation and application of the law depend on the general political order' and that the law was merely a 'sub-system'

[628] ibid., § 81.
[629] ibid., § 87.
[630] ibid., § 88.
[631] ibid., §§ 105-107.
[632] E.g. ibid., concurring opinion of judge Loucaides, and concurring opinion of judge Levits, § 16.

thereof.[633] Confronted with the question of whether a democratic system could re-interpret the law of a demised non-democratic regime, he argued in the affirmative, claiming that 'democratic states' had no alternative but to apply 'previous law, originating in a pre-democratic regime' in accordance with their democratic views. Doing otherwise would damage the *ordre public* of the democratic state.[634] Arguably, his concurring opinion reflected legal as well as political considerations when claiming that the use of law 'according to socialist or other non-democratic methodology (…) should from the standpoint of a democratic system be regarded as wrong'.[635] He went on to claim that the 'universality of human rights and democratic values' would be 'well understood in the world' at least since the Nuremburg Trials and therefore were 'forseeable for everybody' – thereby invalidating claims that the applicants could not have been aware of any future change in the application of the law.[636]

Lastly, Judge Levits warned against taking the law of authoritarian regimes too seriously. He correctly argued that in the case at hand, the conclusions had been based on positive law of the GDR. In his view, that was possible because the legal texts were 'well-formulated in a language which was similar to the language' of democracies governed by the rule of law. However, Levits warned that the rule of law was 'not the real intention of the non-democratic regime of the GDR'. Rather, the law had a 'rather (…) propagandistic character'.[637] While Judge Levits argued it was perfectly legal and legitimate for the FRG to apply the GDR's law in a new way, he asserted that 'newly established democracies' should not be constrained in their attempt to 'deal with the "legacy"' of former authoritarian regimes. Levits believed that they should 'not depend solely on the wording of the legal norms of the non-democratic regimes, formulated in the first place not for legal but for rather

[633] ibid., concurring opinion of judge Levits, §4.
[634] ibid., § 8.
[635] ibid., § 10.
[636] ibid., § 11.
[637] ibid., § 14.

for propagandistic purposes'.[638] This claim perfectly summarised the predicament faced by the German courts in the Border Guard Trials: to adjudicate on state crime of a perished regime which might have been legal at the time, but most certainly violated any common sense and every human rights catalogue written with the blood of millions in the twentieth century.

Summary

As for legal considerations, the question of the punishability of fatal shots at fugitives was the most pressing problem of the Border Guard Trials. After all, GDR border guards claimed that they had acted under orders and in accordance with the law of the time. Citizens from East and West Germany partially shared that view, as letters to the Federal President demonstrate (see chapter 5). Early on, it was contested whether and how those deeds in question had been punishable. In fact, this contestation goes all the way back to the establishment of the *ZESt* in 1961, certainly to the debates since the Hanke verdict in 1963. In the case of the border guard cases, the first two verdicts differed widely in their approach to establishing the punishability.

In the first verdict, the *Gueffroy* case in early 1992, Berlin's regional court relied on supra-positive or natural law considerations to establish why the court was competent to punish Ingo Heinrich and Andreas Kühnpast. The Radbruch Formula was a key stone in these considerations. This legal principle, first formulated by German law professor Gustav Radbruch in 1946, holds that where the positive law and supra-positive legal considerations collide, positive law usually has precedence. However, in grave situations where following positive law would entail severe injustice, the 'incorrect law' must yield to justice. In short, this principle allows for courts to disregard positive law, e.g. in dictatorship, to substantiate criminal

[638] ibid., § 15.

proceedings against state crime that may have been warranted by statute in an authoritarian regime.

In its second verdict in the *Schmidt* case also in early 1992, Berlin's regional court (if, however, a different chamber) took an entirely different route to establish punishability. Where the first verdict had relied on extensive considerations of supra-positive law, this second verdict utilised used a hyper-positive reading of GDR law, enriched with the principle of proportionality. In this case, the court argued that the punishability had been established *even in GDR law,* if only interpreted correctly. At the same time, this chamber outrightly rejected the use of the Radbruch Formula.

When new legal challenges emerge, it is no surprise that lower courts come to diverging results in their jurisprudence. It is then the mandate of high courts to provide legal guidance and to ensure a coherent and consistent application of the law. Called upon to do so in 1992 and 1993, the Federal Court of Justice partially rejected and partially acknowledged both previous rulings from Berlin's regional court. By and large, the court confirmed the verdicts and – most importantly – confirmed that 'criminal' acts at the Inner German border and at the Berlin Wall were indeed punishable. It came to this conclusion largely by relying on positive GDR law, enriched with considerations of supra-positive law, especially the Radbruch Formula. In the FCJ's view, the GDR border law itself had not been consistent with obligations of the GDR under international law and especially under human rights treaties such as the ICCPR. In its judgement, the FCJ elevated itself to the authoritative interpreter of GDR law, thereby opening the door for criticism – namely, ignoring the legal reality in the GDR.

The FCJ's decisions provided much-needed legal clarity and guidance for future trials. The judges detailed reasoning paid off when the matter came before the Federal Constitutional Court which confirmed the legality of the convictions. In

rendering this judgement, the FCC managed to square the circle of limiting the extent of *nulla poena* while decisively claiming the opposite and declaring the prohibition of retroactive punishment 'absolute'. It did so by linking this legal paradigm to the legitimacy of democratic legislatures, thereby abandoning pure legal positivism in favour of a normative approach. 'Material justice', the judges found, was paramount. The legal tool which helped this conclusion be reached was the Radbruch Formula, a legal paradigm developed in the wake of World War II to enable criminal trials against Nazi perpetrators. This paradigm, a lubricant in the interpretation of the constitution, once more established a connection between Nazi crimes and socialist state crime, albeit courts and politicians were careful not to equate the scale of crimes and the gravity of the dictatorships. This judgement was echoed by the European Court of Human Rights in Strasbourg. Being an international court, the ECtHR went further into the realm of international law than German courts which had, essentially, decided the cases based on domestic law. The ECtHR's judges identified the transitional and hence political nature of the trials against former regime perpetrators, while supporting the findings of the German courts. The Court's decision, but even more one concurring judgement discussed whether GDR leaders had committed crimes against humanity, establishing a link between German domestic legal debates and the emergence of international criminal law since World War II.

The trials against former members of the National Defence Council (1992-93) and of the Politbüro (1995-97) saw some the most prominent former leaders of the GDR in the dock. In these trials, a step-by-step link was established between individual political acts of the defendants and fatal incidents at the border. Likewise, the courts demonstrated that the defendants were part of the official channels of reporting when a fatal incident at the border had occurred. The verdicts provided a detailed portrayal of the power relations between institutions of the GDR and established the SED's *Politbüro* as the centre of power, and the NVR as the place where the concrete design of the border regime was conceived and

implemented. With demonstrating that spring-guns usually only prevented border crossing from East to West, not *vice versa,* and that the aim of the shooting training was merely to hit the 'target', not to learn how only to hit limbs, the courts also refuted the claim that the GDR was protecting its border like any other state. With these detailed arguments, Berlin's regional court punished the military leaders Keßler and Streletz and political leaders Albrecht, Krenz, Schabowski and Kleiber for specific political acts, for the failure to oppose the border regime, and in some cases for issuing orders. They were not, however, punished for being members of a perished regime. This was no victor's justice.

In the NVR case, the judiciary came under heavy criticism for suspending the proceedings against Honecker, Stoph and Mielke. In all cases, this had to be done due to the defendants' very poor health conditions. However, given the law and interventions of Berlin's Constitutional Court, the judges had no other choice than to let them off the hook. This also helped to protect the ongoing proceedings against Keßler, Streletz, and Albrecht and to shore them up against claims of political show trials. Still, in the eyes of the public, Honecker's release clearly undermined the legitimacy of trials and convictions of rank-and-file border guards. In this light, an adjustment made by the Federal Court of Justice upon revision in the NVR case was important. It declared that military and political leaders were not merely instigators to manslaughter, but principal perpetrators. This could be understood as an attempt to transfer their political responsibility into criminal culpability. Still, the regional court and the FCJ credited all defendants for cooperation and Krenz especially for his positive role in the autumn of 1989.

5. Transitional Justice and Public Opinion

In the summer and autumn of 2019, a tense debate on East Germany's transformation following German re-unification held the country in its grip. In the face of state elections in Brandenburg and Sachsen on 1 September 2019 and in Thüringen on 27 October 2019, the country examined why – apparently – East Germany's political and mental landscape differs so vastly from that of West Germany.[639] In the run-up to these elections, an *Allensbach* poll revealed a stark difference in political loyalty of East Germans and West Germans to the Federal Republic. When asked if they identify primarily as *German* or *West German*, seventy-one per cent of responders in West Germany said they identified as *German*; only twenty per cent thought themselves primarily *West German*. In the former East, merely forty-four per cent of respondents viewed themselves as *German,* while fourty-seven per cent identified primarily as *East German.*[640] With almost fifty per cent of respondents in East Germany cultivating a specific regional identity related to an sunk authoritarian regime, it seems plausible to assume that political support – or legitimacy – of the political and social system of the Federal Republic is capable of improvement.[641] And regularly, commentators have blamed

[639] Most recently, see *Der Spiegel's* special edition on the thirtieth anniversary of the fall of the Wall, which is entitled: 'Ziemlich beste Deutsche. Warum es uns so schwerfällt, ein Volk zu werden'. See *Der Spiegel* No. 39a, 25 September 2019. On the alleged media bias to the detriment of East Germany, see Mark Siemons: '*West-Komplex. Blinder Fleck: Wie ticken eigentlich die Beobachter des Ostens',* in: Frankfurter Allgemeine Sonntagszeitung, 1 September 2019, p. 33; See also an interview with the former president of the Treuhand, Birgit Breuel: Inge Kloepfer: *'"Westdeutsche hätten das nicht durchgehalten." Birgit Breuel im Interview',* in: Frankfurter Allgemeine Sonntagszeitung, 14 July 2019, online available at: https://www.faz.net/aktuell/wirtschaft/treuhand-chefin-birgit-breuel-im-interview-16294586.html, last access: 15 September 2019.

[640] Köcher, Renate: 'Das ostdeutsche Identitätsgefühl', in: Frankfurter Allgemeine Zeitung, 24 July 2019, p. 8.

[641] However, it needs to be noted that in 1992, sixty-three per cent of respondents in East Germany identified primarily as 'East German, in 1997, this figure was even sixty-seven per cent. Thus, the

the specific way in which German re-unification was achieved on a economic, political, and legal level for this lack of self-identification with and popular support of the re-united country's public order.

In this chapter, it will be asked how the public has viewed criminal trials in context of wider experiences of transformation during the 1990s. In mixing qualitative and quantitative examinations, this chapter explores how the wider public in Germany has thought about criminal trials as a transitional justice measure: did they perceive trials as fair and appropriate, or did they see them as victor's justice? Did they think they would foster German re-unification – or deepen divisions? To what extent did commentators in newspapers contemplate the challenges and quandaries of this form of transitional justice? Is it, perhaps, even possible to study the role these trials played in the overall process of German re-unification, to what they may have been 'successful' as a transitional justice measure aimed at providing the new order with legitimacy and restoring 'justice' with respect to past injustices?

Posing these questions is ultimately to ask about the legality, legitimacy and success of the 'border guard trials', and of post-Socialist criminal trials in a wider sense. The aim of this study, however, is not to pass judgement on the legality of past judicial practices, but to understand and depict them. And when debating the 'success' of using the criminal law as a means to 'overcome' Socialism, this study deploys a strictly consequentialist approach. This means asking if the trials may have helped equip the new body politic with legitimacy. As sketched out above, 'legitimacy' or 'political support' are understood and used as descriptive terms referring to popular support for specific actions of the state, as well as to the whole body politic and the wider social order in a more diffuse way. Providing such

figures are declining over a longer period. Cf. Allensbacher Jahrbuch für Demokratie 1993-1997, Bd. 10, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saus 1997, p. 560.

popular support or legitimacy is arguably a fundamental task of transitional justice measures in post-conflict or post-tyranny situations.[642]

In this light, this chapter argues that from the outset, the use of the criminal law against former GDR officials faced public opposition. Press commentators and the wider public were especially sceptical of criminal proceedings against 'ordinary' border guards and other subordinates. Courts attempted to develop a systematic approach which took into account individual levels of responsibility for the border regime as a whole and acknowledged that 'ordinary' border guards where, in a way, 'also victims' of the border. However, this taxonomy was not overly successful in securing public support for criminal trials. It will be demonstrated how public dissatisfaction was amplified by the temporal imbalance between early trials against 'foot soldiers' and later proceedings against the GDR's military and political elites. Arguably, this particular experience of frustration was then intermingled with broader transformative experiences, such as vast unemployment, rising levels of 'everyday crime', social changes, and revelations about the extent of *Stasi* crimes. Against this backdrop, dissatisfaction about the border guard trials served as a perpetual and reiterative reminder of various frustrating cultural, economic and social experiences. Therefore, if considered as measures of transitional justice, criminal trials against former GDR officials have failed to achieve their aim of supporting the new political order with legitimacy. Instead, they have contributed to a growing dissatisfaction with the way German unity was shaped during the 1990s.

---

[642] On legitimacy, see Considine/Afzal, Legitimacy; Blatter, Legitimacy; Beetham, David: *'Legitimacy'*, in: International Encyclopedia of Political Science, vol. 5, edited by Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morino, London et al: Sage 2001, pp. 1414-1425; Easton, Analysis; Fuchs, Dieter et al: *'Support of the Democratic System'*, in: Klingemann, Hans-Dieter / Fuchs, Dieter (eds.): Citizen and the State. Beliefs in Government, Vol. 1, Oxford 1995, pp. 323-353.

Examining societal ramifications of transitional processes on a macro level is a challenging endeavour, to say the least. More likely, perhaps, it is a challenge that cannot be mastered. However, this cannot be an excuse not to try. In this light, this chapter aims at adding some pieces to a puzzle which, in all likelihood, will never be finished. But, as with archeological artefacts or palimpsests, sometimes, pieces of a puzzle can help us to imagine a wider picture which still sheds some light into previously dark corners of our knowledge. To this end, a mix of primary sources will be studied. Press comments of a small sample of regional newspapers will be analysed with regard to their view on decisive court decisions. These will be one newspaper each from East and West Berlin (Berliner Zeitung and Berliner Morgenpost, respectively). Moreover, the regional newspapers from Erfurt (Thüringer Allgemeine) and from Vechta in rural West Germany (Oldenburgische Volkszeitung) will be presented. Secondly, a series of citizens' letters to the Federal President from the early 1990s will be qualitatively examined.

A burdened Beginning: Setting the stage for the Border Guard Trials

Unemployment is one of the faces of German reunification. After the fall of the Wall, and even more so after German re-unification, hundreds of thousands of citizens of the GDR or reunited Germany's *Neue Länder*, respectively, lost their jobs. Many more feared they would do so and this fear, probably, made them endure all sorts of frustrations in their job in order to keep it. In 1990, West Germany's unemployment rate was slowly recovering from more than half a decade of high unemployment, with 1985 showing the peak of 9.3 per cent of West Germans being unemployed. This had fallen to 7.2 per cent in 1990.[643]

[643] Bundesagentur für Arbeit (ed): Arbeitslose und Arbeitslosenzahlen – Deutschland und West/Ost (Zeitreihe Monats- und Jahreszahlen ab 1950), accessible here: <https://statistik.arbeitsagentur.de/nn_31892/SiteGlobals/Forms/Rubrikensuche/Rubrikensuche_Form.html?view=processForm&resourceId=210368&input_=&pageLocale=de&topicId=17722&year_month=aktuell&year_month.GROUP=1&search=Suchen>, last access: 1 July 2019.

There was no such thing as unemployment in the GDR, at least not officially. Everyone had a job, even if it meant sitting around rather uselessly in a control room or taking a nap. In 1991, the first reported official figure for unemployment in East Germany showed remarkable 10.2 per cent, while only 6.2 per cent of the civil population were unemployed in West Germany at the time. Over the coming years, figures in both parts of the country soared up to more than nineteen per cent in the East in 1997 and 1998, and more than ten per cent in the West during these years.[644]

While forced unemployment is always distressing, at least for most of us, East Germany's situation was specific. Here, unemployment was at the risk of being strongly related to re-unification, casting a shadow onto the formerly desired union of the states and personal and economic freedom. And while German re-unification as such can not be held accountable for an economic situation mainly caused by a bankrupt state and economic system, re-unification might very well have been blamed for it.[645]

Unemployment and social uncertainty were two of the major themes running through East Germany's most prominent illustrated magazine, *SUPERIllu*, which has often been hailed as the 'voice of the East'.[646] A frustration born out of experiences of or fear for personal deprivation was further amplified by open property questions. The GDR had expropriated former house and land owners, be it for the benefit of state property or because they had fled the country. Some of these properties were then sold to other citizens. In 1990, the GDR's *Volkskammer* had passed a law regulating such questions of contested properties. According to

[644] ibid.
[645] Böick/Goschler, Wahrnehmung; most recently on Treuhand-related 'myths', see Pötzl, Norbert F.: Der Treuhand-Komplex. Legenden, Fakten, Emotionen, Hamburg: Kursbuch.Edition 2019.
[646] for examble, see Superillu (1991), No. 22 (23 May 1991) and No 23 (30 May 1991).

this, the return of expropriated properties enjoyed preference over compensations. This was a recipe for social unease between former and current landowners.[647]

Against this backdrop, revelations about the luxurious lifestyle of former leaders continued to ramp up public debate, as it had done since the first revelations in October 1989.[648] What sparked particular outrage was Alexander Schalck-Golodkowski's life after reunification. From 1975 to 1989, he had been state secretary in the GDR's ministry for foreign trade. From 1976, he was also member of the economic commission in the SED'S Politbüro. From 1996 onwards, he was the head of Koko ('Kommerzielle Koordinierung'), an office designed for handling secret deals with the West in order to secure the GDR's supply with hard currencies. After he had fled the GDR in December 1993, no trial against him could be open until 1995. Several investigations related to his acts as the head of KoKo had to be closed.[649] His private re-location to the picturesque Tegernsee in Oberbayern might have struck some East Germans as a perversion.

Probing questions about when Alexander Schalck-Golodkowski could be criminally charged were one of the constant themes running through virtually almost every issue of *SUPERIllu* in 1991.[650] As is the style of an illustrated magazine, *SUPERIllu* continued its chase for former elites. Potentially criminal or corrupt acts of Honecker were exposed[651], and a series revealed crimes of Politbüro

---

[647] On the difficult diplomatic negotiations about expropriations, see Elbe, Frank/Kiessler, Richard: A Round Table with Sharp Corners. The diplomatic Path to German Unity, Baden-Baden: Nomos 1996, 170-77; Dahn, Daniela: Wir bleiben hier oder wem gehört der Osten. Vom Kampf um Häuser und Wohnungen in den neuen Bundesländern. Reinbek bei Hamburg: Rowohlt 2003.

[648] Bock, Systemwechsel, 81-86.

[649] For Schalck-Golodkowski's biography, see Zündorf, Irmgard: Biografie Alexander Schalck-Golodkowski, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/alexander-schalck-golodkowski.html>, last access: 01 July 2019.

[650] For example, see Superillu (1991), No. 19, 2 May 1991; No. 21, 16 May 1991; No. 22, 23 May 1991; No 23, 30 May 1991; No. 41, 2 October 1991; No. 46, 7 November 1991.

[651] Superillu (1991), No. 19, 2 May 1991

members from a book.[652] Other texts revealed the story, intended to spark outrage, of a Stasi colonel who had become a lawyer after reunification; a text on 'the gentle fall of the red gods', which portrayed alleged economic privileges which former elites enjoyed after reunification; or an attempted deal where contaminated soil from West Germany was meant to be dumped in the East, thereby potentially prompting feelings of being treated as second-class citizens among East Germans.[653] Prejudice and distrust left their mark on Inner German relations, as a few testimonials of East Germans on West Germans ('Wessis') show: they describe their fellow citizens from the West as 'arrogant and snobbish', as 'unkind, selfish, greedy for money', as 'unreliable', 'treating us like second-class people'.[654] In a similar manner, an opinion poll of Forsa Institute on behalf of Berliner Morgenpost showed in January 1992, one third of East Berliners thought that 'West-Berliners' arrogance' is an obstacle for actual unity in the city.[655]

In a lead story on the first anniversary of German re-unification, *SUPERIllu* took stock of the process and came to mixed results. Both citizens as well as celebrities mentioned unemployment and low pensions as a cause of frustration, they also expressed delight at the freedom gained or in the light of personal career advancements.[656]

'The long arm of justice'

Not suprisingly, the first border guard case against the alleged slayers of Chris Gueffroy provoked intense debates. Some two weeks before the trial was opened, *SUPERIllu* published a micro survey of citizens' views on the upcoming trial. The

[652] The series in 1991's Superillu issues quoted from this book: Pruybylski, Peter: Tatort Politbüro: die Akte Honecker, Reinbek bei Hamburg: Rowohlt 1991/1992.
[653] Superillu (1991), No. 23, 30 May 1991, No. 23, 6 June 1991
[654] 'Die freche Frage: Wessis – was fällt ihnen dazu spontan ein', in: Superillu (1991), No. 24, 6 June 1991.
[655] Berliner Morgenpost, 20 January 1992.
[656] Superillu (1991), No. 41, 2 October 1991

text claimed: 'The long arm of justice is now grabbing the border guards who chased refugees with their weapons. But again it looks like only the little ones have to pay.'[657] Some of those surveyed supported the trials against Ingo Heinrich, Andreas Kühnpast, Peter Schmett and Mike Schmidt; others thought that they had acted under orders and should be able to leave the court as free man. All commentators, however, thought that it was paramount to hold to account those who bore political and military responsibility for the Inner German border.

The use of the word 'again' in the aforementioned quote probably serves as a semantic tool to spark outrage about a perceived line of similar events which might not have been all too long in early 1991. Oh the other hand, the headline refers to a perception that former elites like Honecker and Schalck-Golodkowski, whose actions had received extensive coverage in 1991, remained uncharged, while 'ordinary men' had to stand trial at a time when many East Germans learnt a hard economic lesson about the reality of reunification. The idea that only 'small men' had to pay the price for overcoming Socialism did not seem all that alien. This was, perhaps, not an ideal starting point for trials of transitional justice. In September 1991, a representative opinion survey showed that only a few months into the very first border guard trial, fifty-five per cent of Germans in East and West advocated to close the proceedings; in East Germany, two thirds of respondents thought this way.[658]

When Heinrich and Kühnpast were convicted on 20 January 1992 (and Schmidt and Schmett were acquitted), the press reacted cautiously. In West-Berlin's rather conservative *Berliner Morgenpost*, Rudolf Stiege commented that the verdicts were

[657] 'Der lange Arm der Gerechtigkeit packt jetzt die Grenzsoldaten, die Flüchtlinge mit der Waffe gejagt haben. Doch wieder sieht es so aus, daß nur die Kleinen büßen müssen.', in: Superillu (1991), No. 20, 8 May 1991.
[658] Forsa-opinion poll for the tv-station RTL Plus, reported in: Neues Deutschland, 19 September 1991.

'extraordinarily differentiated'.[659] He expressed slight doubts if the verdicts could withstand revision. However, he also made clear that this case had not seen 'the real culprits'.[660]

This notion was widely shared. In *Thüringer Allgemeine*, one report suggested that the trial had not been able to 'free itself from the accusation that the wrong men had been charged.'[661] In this paper's comment, Ingo Linsel welcomed the verdict's notion that every individual had to check their conscience. At the same time, the author wondered why Erich Honecker then could have visited Bonn in 1987 without being arrested. In the light of the verdict, he argues, GDR citizens could have seen an implicit acceptance of the 'existing order' in all those handshakes between Honecker and West German politicians.[662] Concluding, Linsel also drew a parallel to Gerhard Klopfer, asking how he could remain free when there was a 'core area of the law' which could never be violated, as the verdict against Heinrich et al. had argued. [663] The SS-Gruppenführer Klopfer had been a participant of the *Wannseekonferenz* in 1942, where the total annihilation of European Jews had been resolved. He was never convicted for this. This comment reflected a series of prominent assumptions: that Honecker's state visit to Bonn had legitimised the GDR and that a line had to be drawn from the Border Guard Trials to the so-perceived failed or neglected prosecution of Nazis. *Thüringer Allgemeine* also commented that this was 'another verdict… on the assessment of the GDR'.[664] In

[659] 'außerordentlich differenziert', Rudolf Stiege: 'Das Elend an der Mauer', in: Berliner Morgenpost, 21 January 1992.
[660] 'die wirklichen Täter', ibid.
[661] 'Dennoch konnte sich der fast fünf Monate dauernde Prozeß gegen die vier Grenzsoldaten nicht von dem Vorwurf befreien, daß die Falschen angeklagt sind.', in: Thüringer Allgemeine, 21 January 1992.
[662] '… die Rechtmäßigkeit der bestehenden Ordnung impliziert.', in: ibid.
[663] 'Kernbereich des Rechts', Erstinstanzliches Urteil des Landgerichts Berlin vom 20.1.1992, Az. (523)2 Js 48/90 (9/91), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 5-70. [Gueffroy case], [p. 51] (section VIII 1. He).
[664] Thüringer Allgemeine, 21 January 1991.

perhaps slightly over interpreting this sentence's semantics, it is striking how the author equates a verdict against four individuals (two of whom had been acquitted) with an evaluation of the former GDR as a whole. He concluded that the current legal approach threatened to 'narrow down guilt onto citizens in the East'.[665] In his view, the relatives harsh sentences of three years and six months in prison for Ingo Heinrich had to be seen as 'scorn' when former leaders had to defend themselves merely in bagatelle cases: 'Nothing could cripple the sense of justice in the East any more.'[666]

East Berlin's daily newspaper Berliner Zeitung shared a certain degree of caution against the verdict, which would 'surely not be the last verdict'.[667] Commentator Hans-Werner Neubacher conceded that the defendants had never had a life 'without the Wall and in real freedom' and had been 'systematically indoctrinated'.[668] While this would not free them from 'moral responsibility', Neubacher found that the verdict failed to address these normative challenges.[669] He believed that this trial had predominantly been pushed as a legal precedent in order to charge Erich Honecker and his allies with instigation of criminal acts. However, the commentator complained that so far, 'the last links' of the long chain of command had been 'burdened with all guilt', thereby also criticising the judicial branch for prosecuting gunmen while allegedly sparing former elites.[670] Oldenburgische Volkszeitung's Jörg Respondek also thought that the order guards were 'merely the last and weakest link of a long chain'. He believed that, if the verdict was to survive revision, 'raise the bar' for Erich Honecker and others all the more.[671]

---

[665] 'Die jetzige Verfahrensweise droht, Schuld auf die Bürger im Osten einzuengen.', in: Thüringer Allgemeine, 21 January 1992.
[666] 'Nichts könnte das Rechtsempfinden im Osten mehr verkrüppeln.', in: ibid.
[667] 'sicher nicht das letzte Urteil', in: Berliner Zeitung, 21 January 1991.
[668] 'ein Leben ohne Mauer und wirkliche Freiheit…', 'systematisch indoktriniert', ibid.
[669] 'moralische Verantwortung', ibid.
[670] ibid.
[671] 'Wenn das Urteil gegen sie Bestand haben sollte, dann hängt die Meßlatte für Erich Honecker und seine Genossen umso höher!', Oldenburgische Volkszeitung, 21 January 1992.

Apparently, reluctant commentators hit the nail on the head for many readers. An Allensbach poll presented only days after the verdict showed waning public support for the Border Guard Trials. While in West Germany in August 1990, fifty-one per cent of respondents had said they saw gunmen at the border as marginally guilty underlings (*'minderbelastete Befehlsempfänger'*), the figure had soared up to sixty-one per cent of West Germans in February 1992.[672] In East Germany, seventy-seven per cent of respondents thought that same way, while only nine per cent saw them as 'criminals' (West: twenty per cent).[673]

Merely days later, the second verdict against border guards was handed down (see chapter 4). Udo Walther and Uwe Hapke were both sentenced to a suspended prison sentence of eighteen and twenty-one months. This trial already received less attention, as papers merely reported and did not print any comment. However, in its report, the Berliner Zeitung described the opinion of the court as 'balanced'.[674] Journalists recognised that in the second case, the court had come to a different reasoning. While in the first case, the presiding judge had mainly relied on supra-positive legal norms, in this second case, the presiding judge Ingeborg Tepperwien ruled that the killing of unarmed fugitives was illegal even under GDR law. The press acknowledged that this verdict paid more tribute to the actual conditions of service at the Wall and border.[675]

This second verdict, however, also strengthened public demands to get the ball rolling in the prosecution of former GDR elites. This second verdict especially put Berlin's judicial branch under pressure to go after them. Not doing so would

[672] 'low load command receivers'
[673] Allensbach poll, Neue Zeit, 25 January 1992; no poll was conducted in East Germany in August 1990.
[674] 'ausgewogen', in: Berliner Zeitung, 6 February 1992.
[675] Berliner Zeitung, Thüringer Allgemeine, both 6 February 1992.

become ‘more questionable, not to say more embarrassing’ by the day.[676] Still, one day later, when the trial against former SED head of the Erfurt district, Gerhard Müller, was opened, Thüringer Allgemeine’s Karl-Heinz Schmidt acknowledged that the penal law was an imperfect measurement to do justice to the ‘crimes’ of elites: ‘But there is no other measurement’.[677]

Citizens’ Reactions

As the first case against GDR border guards, the Gueffroy trial understandably made it into almost every front page of newspapers. Its relevance can also be seen in prompting private letters written to the Federal President by citizens. Restoring to this means has been seen in a line of continuity with pre-modern states, where subjects could plea to their sovereign in personal matters.[678] In the case of the GDR, *Eingaben* have been described as 'channeled form of social protest', the content of which was only known to the regime and could not cause protests to spread. Therefore, petitioners usually did not have to fear disadvantages.[679] In re-united Germany, the Federal President has no power to revise administrative or judicial decisions. However, the right to pardon lies with him for cases where criminal proceedings fall within the competence of federal prosecutors (Generalbundesanwalt).[680] Moreover, citizens write to the federal president with questions, wishes, complaints and pleas. According to official information, the president makes ‘full use of all possibilities of influence’ in justified cases, including involving appropriate institutions or charity organisations.[681] Hence, for some citizens, writing letters to the federal president was also seen as an appropriate

[676] Berliner Zeitung, 6 February 1992.
[677] Thüringer Allgemeine, 7 February 1992.
[678] Bouvier, Beatrix: Die DDR – ein Sozialstaat? Sozialpolitik in der Ära Honecker. Bonn: Dietz 2002, p. 314.
[679] 'kanalisierte Form des sozialen Protestes', ibid., p. 312.
[680] Art. 60 GG.
[681] Der Bundespräsident: ‘Eingaben und Petitionen’, <http://www.bundespraesident.de/DE/Amt-und-Aufgaben/Wirken-im-Inland/Eingaben-und-Petitionen/eingaben-und-petitionen-node.html>, last access: 14 May 2019.

means to ventilate their views on the transformation of and in East Germany, including criminal trials.

However, the numbers of letters written to the president remained quite low. Only some thirty letters were sent to Federal President Richard von Weizsäcker in Spring 1991 and Winter 1992, when media coverage of the Gueffroy case was extensive. While a majority of letters were posted from writers in East Germany, they were also sent from the former West. Most letters opposed the trials as a means of 'coming to terms with the past', even though a few letters were supportive or discussed the matter in a well-balanced manner. [682]

Three major themes run through these documents. The first leitmotif in these letters related to the factual validity of GDR law and orders regulating the border regime. Sometimes, the internationally accepted sovereignty of the GDR was invoked; more often, the authors mentioned that even the Federal Government had courted the GDR leaders with state visits in Bonn.[683] Here, the social relevance of Honecker's long-desired state visit to Bonn became obvious. In the wider population, it helped to establish a sense of proper recognition of the GDR by the FRG.[684]

The second major theme as the well-known notion of a 'command emergency' (*Befehlsnotstand)*. This term describes a legal dilemma in which a subordinate is in a quandary to either break the law by executing an unlawful order, or by breaking the law by defying an order. It had been well-known, so it was argued in these letters, that for a border guard, intentionally missing a fugitive citizen would have meant a prison sentence or harsh disciplinary measures. However, given the

[682] BArch B 122 / 56083.
[683] e.g. BArch B 122 / 56083, pp. 35, 50-52.
[684] Conze, Sicherheit, 646-53.

findings that Kühnpast was only bullied for refusing to use his gun, and that the lack of precision of the standard rifle AK-47 was well-known, doubts as to if this was true are allowed.[685] Another variation of this argument saw the border guards, in this case young men, as victims of comprehensive propaganda, so that they would not have had any choice but to follow their orders. In short, many saw the ideological and disciplinary circumstances as having a mitigating effect on the guards' guilt.[686] This notion was later also uttered by the Federal Criminal Court (FCJ) in its high court rulings on the legality of the verdicts against H. and others.[687]

The third and biggest theme in these letters referred to the expression of hanging the small men and letting the big men run. It was widely criticised that the executing border guards had been put on trial and sentenced, whereas state and party leaders remained uncharged and unchallenged by the time the first verdict was handed down in early 1992. In fact, the NVR case (which also saw Honecker in the dock) was not opened until November 1992, and the FCJ itself noted in its judgements against rank-and-file border guards of November 1992 and March 1993 that the failure to charge and convict superiors was considered to have a mitigating effect on sentences for subordinates.[688] The reason for the judiciary's failure to bring former state leaders before a court earlier than late 1992 was investigations against them were much more complex and hence time-consuming than investigations against one-time offenders such as the border guards (see Part III). The bigger share of these letters fundamentally criticise the first trial (i.e. the *Gueffroy* case) for those various aforementioned reasons; but it is not the paradigm of using the criminal law as a means of transitional justice *as such* which was challenged by these citizens. It was the *implementation*, not the *principle*, that drew so much criticism.

[685] Cf. the *Gueffroy* verdict, chapter 4.
[686] e.g. BArch B 122 / 56083, p. 46.
[687] See the *Gueffroy* and *Schmidt* verdicts in chapter 3.
[688] e.g. BArch B 122 / 56083, p. 44.

However, a few letters rejected the idea of criminal prosecution altogether. A few quotes illustrate how this position was often linked with more general criticism of the processes and adjustments which had been following German reunification. One particular author complained that the leaders remained uncharged and thought that the trials were inappropriate:

> 'I'm not a lawyer, I'm a simple person, but from the East and that unfortunately often reduces the quality today. But I already feel today's judgement as a new injustice, as the evil pose of the victors over the vanquished.'[689]

In this quote, we can already sense the writer's perception of a general degradation, a sense of inferiority imposed onto him and other East Germans by the allegedly merciless victors of the Federal Republic. He also wrote the following lines which are potentially paradigmatic for feelings of many East Germans:

> 'Every day I can/must hear/read, often from early in the morning to evening in most media, what an outstanding state the old FRG and what hard-working people its citizens were and in contrast what a miserable state this GDR was and what miserable sourpusses and loafers most of the people living in it for 40 years have been. For some tabloids there were and are only SED and Stasi criminals, recorders, stupid followers, women forced to work and children pumped full of phrases, …'[690]

Another citizen expressed his disrespect for the new state and his perception that the whole population of the former GDR was being prosecuted and punished. He asked the President to end 'the witch trials against GDR citizens.' [691] This expression reveals a sweeping equalisation of those prosecuted border guards with

---

[689] 'Ich bin kein Jurist, ich bin ein einfacher Mensch, allerdings aus dem Osten und das mindert leider heute oftmals schon die Qualität. Aber ich empfinde das heutige Urteil bereits als neues Unrecht, als böse Pose der Sieger über die Besiegten' BArch B 122 / 56083, pp. 56f.

[690] *'Täglich kann/muß ich, oft von früh bis abends in den meisten Medien hören bzw. lesen, was für ein hervorragender Staat die alte BRD und was für fleißige Menschen ihre Bürger waren und im Gegensatz dazu was für ein miserabler Staat diese DDR war und was für Miesepeter und Faulpelze die meisten der in ihr 40 Jahre lebenden Menschen gewesen sind. Für einige Boulevardblätter gab und gibt es hier nur SED- und Stasi-Verbrecher, Blockflöten, dumme Mitläufer, zur Arbeit gezwungene Frauen und mit Phrasen vollgepumpte Kinder, …'*. BArch B 122 / 56083, pp. 56f.

[691] BArch B 122 / 56083.

the whole GDR and her citizens. These 'show trials', he continued, were proof that the GDR citizens had been betrayed by reunification.[692] It could not be expected that he would be faithful to the Federal Republic, if the public expected the border guards to dishonour their oath of allegiance as GDR soldiers. He concluded by asking the President to reverse the judgements and to refrain from future trials in order to enable the Germans to peacefully grow together.[693] These two letters reflect an astonishing equation of the trials against border guards with the GDR and its population in general. It becomes obvious that in the views of some, the border guard trials triggered feelings of general devaluation of East Germans and their past experiences through many facets of the legal, political, economic, social, and cultural transformation that took place during the 1990s.

The standard alternative suggested by most writers was either to only prosecute state and party leaders, or to leave criminal prosecution be altogether. One particular author suggested an interesting alternative to criminal trials: instead of prosecuting those border guards who had shot and killed, he suggested to issue formal commendations for those who rejected to follow their orders as border guards.[694]

One letter stood out from the crowd by making a case for criminal prosecution. In a very differentiated piece, this person argued that criminal prosecution was necessary for German reunification to become a success. There could be no justice if those responsible would not be charged. Not to do so would mean yet another denigration of the dead. The writer also rejected the legal positivist notion that was being used to defend the GDR border regime. In conclusion, it was written:

> 'Wir im Osten brauchen die Betsätigung (sic!), daß es Recht gibt. Wir brauchen die Gewißheit, daß Unrecht, hinter welcher Pseudogesetzlichkeit es sich auch verstecken

[692] ibid.
[693] ibid.
[694] BArch B 122 / 56083, p. 38.

mag, seinen gerechten Richter findet, sonst nimmt der neue Anfang schweren Schaden…'[695]

Contrary to the claims of fears of many of these citizens that the state and party leaders would be spared, it is important to note that questions of how to go after Erich Honecker and others were soon at the centre of the public debate. Practical problems, however, prevented this from being realised initially. Also, quite soon the courts developed a legal taxonomy of sentences which usually saw a suspended prison sentence of up to twenty-four months for firing border guards, and higher sentences for superiors and state and party leaders (see chapter 4).

However, when those first three dozen letters were written in 1991 and 1992, their writers could not have known that courts would indeed try to accommodate their request for a system of sentences that would take into account the degree of personal responsibility for the border regime. In fact, from that moment's perspective, the prospect of trials against Honecker and the like seemed far away, though it did start on 12 November 1992, only nine months after the first verdicts against border guards.

'Schauen sie, Herr Bundespräsident, die Menschen in den östlichen Bundesländern haben es nicht leicht. So vieles ist neu, soviel macht unsicher, manches sogar Angst. Die Zukunft schwebt mit einer Menge Ungewissem über den Köpfen der Menschen hier, die Gegenwart bietet nur wenig Grund zur Freude. Und eine Vergangenheit gibt es entweder nicht mehr (weil es den Staat nicht mehr gibt), oder sie wird kriminalisiert. Sie sind oberster Repräsentat eines Systems, das jetzt auch für hier gilt. Vielleicht können Sie uns helfen, die Spielregeln besser zu verstehen.' (BArch B 122 / 56083, p. 50-52), written in Berlin on 20 January 1992.

[695] We in the East need to be confirmed that we are right. We need the certainty that injustice, whatever pseudo-legality it may hide behind, will find its just judge, otherwise the new beginning will be seriously damaged…'. BArch B 122 / 56083, p. 99-101.

Early High Court Confirmations, November 1992 – March 1993

Briefly before the Honecker case was opened in Berlin, the FCJ delivered its first landmark ruling. Its decision on 3 November 1992 (Mauerschützen I) provided desperately needed legal certainty. It confirmed the ruling of the regional court by and large. The press saw this confirmation as a important for the upcoming trial against Honecker and others, the so-called NVR case. Thüringer Allgemeine pointed out that the confirmatory FCJ ruling was decisive, as the case at hand was listed as one of the charges against the NVR members in that upcoming important trial in order to proof 'his [Honecker's; P.E.] guilt for homicide' at the border.[696] The verdict, which acknowledged the defendants as 'victim of the border',[697] was read as a statement that the convicted were not the ones in charge of the border regime.[698] However, Berliner Zeitung's commentator had reservations about the verdict: he believed that a 'fierce argument' would continue in a question which 'moved many Germans', until the Federal Constitutional Court could come to a decision.[699] In his view, some questions remained open regarding the limits of the validity of GDR law for German courts and if border guards had been able and responsible for interpreting GDR laws in the right way. In West German *Oldenburgische Volkszeitung*, a report on the FCJ ruling was placed prominently on page two, but did not prompt any comment.[700]

In the following months, media coverage of 'border guard cases' mainly concentrated on the proceedings in the NVR case, while public attention for trials against border guards dropped. When the FCJ delivered its second ruling on the

[696] Thüringer Allgemeine, 4 November 1992.
[697] Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86, [p. 85].
[698] Berliner Zeitung, 4 November 1992.
[699] 'heftiger Streit' , 'viele Deutsche stark bewegende Frage', Berliner Zeitung, 4 November 1992.
[700] Oldenburgische Volkszeitung, 4 November 1992

border guard cases in the *Gueffroy* case on 25 March 1993, substantially less coverage could be observed, even though the court partly dismissed the original judgements.[701] *SUPERIllu*, however, welcomed the partially successful revision as a 'sudden u-turn of the judiciary'.[702] By the magazine's own account, it had covered the legal costs of the appeal process for the defendant Peter Schmett, because '(…) we were convinced that one cannot charge the small men while the big men run free.'[703] Evidently, in the view of the public, it was high time that the 'real culprits' for the GDR's misery belonged in the dock.

A Turning Point: The Challenges to prosecute 'the real culprits', 1992- 1994

The opening of the Honecker case naturally saw another peak in media coverage. As former head of state, Erich Honecker was only the most senior state leader on trial in this case. The other defendants were former Stasi head Erich Mielke, former Prime Minister Willi Stoph, former Defence Minister Heinz Keßler and his deputy Fritz Streletz as well as former head of the SED district of Suhl, Hans Albrecht.

The opening of the trial was the moment commentators and citizens had been waiting for: the moment when 'the real culprits' had to stand trial, even though by then former Stasi head Erich Mielke was already facing a trial for murdering two police officers in 1931. Eventually, Mielke could only be convicted of this double murder, all other charges had to be dropped due to his poor health.[704] It seemed clear to commentators that the trial against Honecker, Mielke etc. was bound to be a disappointment for some. As Thüringer Allgemeine's Ingo Linsel thought, the trial would raise high expectations, but it would also demonstrate 'the limits … of

[701] Berliner Zeitung and Thüringer Allgemeine had merely reports and abstained from a comment on this judgement, see both papers of 26 March 1993.
[702] 'plötzliche Kehrtwende der Justiz', *SUPERIllu* (1993), No. 14, 1 April 1993.
[703] '(…) daß mann nicht die Keinen verklagen kann, solange die Großen frei sind.', *SUPERIllu* (1993), 1 April 1993.
[704] Haunhorst, Regina/Zündorf, Irmgard: Biografie Erich Mielke, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/erich-mielke.html>; last access: 03 July 2019

judicial Aufarbeitung'.[705] Still, he insisted that if the border guards remained the only convicted culprits, 'justice is on his head'.[706]

Likewise, Oldenburgische Volkszeitung's Wolfgang Kupczyk conceded that it would be difficult to proof individual guilt and that therefore, only 'ludicrous sentences' would be handed down.[707] Still, opening the case was a 'moral obligations towards the victims', as the deeds in question, despite being hard to prove, were in their effects deeply inhuman.[708] For this author, the trials had to be seen as 'a signal to take global action against state-mandated injustice'.[709] Therefore, it was necessary to replace 'inhuman national regulations with internationally mandatory' norms to hold 'criminal dictators' around the globe accountable.[710]

Given these high expectations, it is not surprising that huge public outrage accompanied Erich Honecker's release in January 1993 due to health reasons. Honecker immediately left Germany for Chile where he lived in a government campus until his death in May 1994.[711] SUPERIllus chief editor, Jochen Wolff, called the judges who had ordered Honecker's release and the closing of the proceedings 'insensitive and perverse.[712] In his view, the Rechtsstaat had 'disgraced itself immortally'[713] This development was, of course, a welcome invitation for SUPERIllu to print abundantly illustrated stories about Honecker's new home in

[705] 'welche Grenzen der juristischen Aufarbeitung gesetzt sind.', Thüringer Allgemeine, 12 November 1992.
[706] '… stände die Gerechtigkeit auf dem Kopf.', Thüringer Allgemeine, 12 November 1992.
[707] 'lächerliches Strafmaß', Oldenburgische Volkszeitung, 13 November 1992.
[708] 'schwer nachweisbar, aber in ihrer Auswirkung zutiefst unmenschlich', ibid.
[709] 'ein Signal (…), weltweit gegen staatlich verordnetes Unrecht vorzugehen', ibid.
[710] 'inhumane nationale Regelungen durch international verbindliche Verordnungen' , 'verbrecherische Diktatoren weltweit zur Verantwortung', ibid.
[711] Haunhorst, Regina/Zündorf, Irmgard: Biografie Erich Honecker, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/erich-honecker.html>, last access: 03 July 2019.
[712] 'instinktlos und borniert', *SUPERIllu* (1993) No. 4, 21 January 1993.
[713] '… dieser Rechtsstaat hat sich mit Honeckers Ausreise nach Chile unsterblich blamiert.', ibid.

Chile – 'and at home: Rage, Rage, Rage!'[714] In a smaller piece on the side of the page, SUPERIllu quoted Horst Schmidt, father to victim of the Wall Michael Schmidt, where he expressed his 'uncanny rage' about Honecker's liberation.[715]

West German Oldenburgische Volkszeitung, on the other hand, emphasised solely Honecker as puppet master of the deadly border, while neglecting the focus on economic crimes such as corruption and misappropriation of public funds. Here, two conflicting comments were presented. While one commentator admitted to his own rage about Honecker's liberation, he defended the act as expression of the rule of law: 'In our liberal view, the law just is no class or revenge justice. (…) But I'd rather be angry about this Rechtsstaat than be suspected of confusing justice with morality.'[716] Another commentator, however, perceived the previous day of when all charges against Honecker had been dropped as 'a difficult day for the Rechtsstaat, a black day for justice.'[717] In his view, this development would endanger the continued NVR case, as all defendants would now solely blame Erich Honecker for everything. In letters to Federal President von Weizsäcker, citizens also uttered their frustration over Honecker's release and expressed that they could no longer view trials against rank-and-file border guards as just and demanded their pardoning.[718]

In *Berliner Morgenpost,* Bruno Waltert believed that Honecker's release would damage public trust in the rule of law. He argued that the court's decision made it difficult to punish border guards. He claimed that when political leaders such as Honecker went off without punishment, their subordinates should be treated equally

[714] *SUPERIllu* (1993), No. 4, 21 January 1993, pp. 10-11.
[715] 'unheimliche Wut', ibid.
[716] 'Recht in unserem liberalen Verständnis ist eben nicht Klassen- oder Rachejustiz. (…) Aber ich ärgere mich lieber über diesen Rechtsstaat als in den Verdacht zu geraten, Recht mit Moral zu verwechseln.', Oldenburgische Volkszeitung, 14 January 1993.
[717] 'Ein schwieriger Tag für den Rechtsstaat, ein schwarzer Tag für die Gerechtigkeit.', Oldenburgische Volkszeitung, 14 January 1993.
[718] For instance, BArch B 122 / 56083, pp. 6, 8.

– 'This, too, is a piece of the rule of law – even a decisive one.'[719] These remarks again demonstrate how the press was at least partially driven by outcome expectations and how important trials against leaders were in order to justify trials against border guards. In the world of legal proceedings, the *NVR* case had little to do with verdicts against Ingo Heinrich and the like. In political reality, however, those two could not be separated from each other.

With extensive media coverage of the verdicts in the NVR case, a shift of public interest away from trials against individual border guards towards high-profile cases against former leaders can be observed. When the verdict in the NVR case was pronounced in 1993, the trials against Erich Honecker, Erich Mielke and Willi Stoph had been severed and subsequently been terminated due to the ill health of the defendants. Hence, only three persons sat on the defendant's bench in September 1993. One was the former Minister of National Defense, Heinz Keßler. He received a prison sentence of seven years and six months for instigating manslaughter. Fritz Streletz, former deputy Defense Minister and head of the general staff, was also convicted of instigating manslaughter. He was sentenced to five and a half years prison sentence. Lastly, Hans Albrecht, former SED head of the Suhl district, was sentenced to four and a half years for instigating manslaughter. In the appeal before the FCJ, all three were convicted of manslaughter rather than just instigation. Albrecht's sentence was increased to five years and one month.[720]

The verdict in the NVR case was greeted by the press with a mixture of scepticism and satisfaction. *Berliner Morgenpost's* commentator Jan von Flocken

[719] ' Auch das ist ein Stück Rechtsstaatlichkeit – ein Entscheidendes sogar.', Berliner Morgenpost, 14 January 1993.
[720] Revisionsurteil des Bundesgerichtshofs vom 26.7.1994, Az. 5 StR 98/94, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 598-607, [p. 598 ff.].

thought that the verdict sent a 'self-contradictory message' in sentencing the defendants, but releasing them from custody.[721] In this, he suggested 'Judge Salomon' could have been the godfather of the ruling, as it was 'appropriate and follow[ed] elementary commands of justice'.[722] However, he deemed it dissatisfying that Egon Krenz was not in the dock and Erich Honecker had had to be released early.[723] Other commentators saw the ruling as evidence that the criminal law was not sufficient in addressing the aftermath of the GDR dictatorship. *Berliner Zeitung's* Werner Neubacher believed that the sentences were appropriate, as those pulling the levers bore responsibility for the use of weapons against fugitives. However, he also acknowledged that 'conflicts between law and justice' would continuously have to be addressed.[724] Yet, the law itself would not suffice in ascertaining 'true guilt for the developments of the Cold War'.[725] This notion was shared by *Thüringer Allgemeine's* commentator Karl-Heinz Schmidt who thought that the criminal law was an insufficient tool in addressing state crime even legally because 'injustice nested in political spheres'.[726] Yet, the author demonstrated sympathy for potential disappointment of the bereaved of victims of state crime about 'excessively low sentences'.[727] West German *Oldenburgische Volkszeitung* apparently saw no need to comment on the verdict.[728]

[721] 'widersprüchliche Botschaft', Berliner Morgenpost, 17 September 1993.
[722] '(…) angemessen und folgt elementaren Geboten der Gerechtigkeit', ibid.
[723] ibid.
[724] 'Die Konflikte um Recht und Gerechtigkeit (…) werden auch nach diesen Urteilen weiter ausgetragen werden müssen.', Berliner Zeitung, 17 September 1993.
[725] 'Allein juristisch (…) ist die wahre Schuld an den Entwicklungen in den Zeiten des Kalten Krieges nicht zu ermitteln.', ibid.
[726] '… weil das Unrecht in politischen Sphären nistete…', Thüringer Allgemeine, 17 September 1993.
[727] 'zu niedrige Strafen', ibid.
[728] Oldenburgische Volkszeitung, 17 and 18 September 1993.

Repeated reports about the termination of proceedings or investigations against former GDR greats (such as Erich and Margot Honecker) prompted outrage and frustration about the question, why border guards were successfully being sentenced, while those greats were often able to roam freely. In March 1994, *SUPERIllu* published a double page on ''Honecker's sidekicks in court (...) – Why are they all getting off so easy?'[729] The series showed prominent people such as the acquitted Rudi Strobel, head of the Stasi's department for mail control, or former head of government Hans Modrow, who had received a fine for electoral fraud. This was accompanied by an interview with the former president of the *Oberlandesgericht* Braunschweig (Higher Regional Court), Rudolf Wassermann. He accused mild verdicts against former GDR greats of 'a certain blindness towards what the GDR had done to the people'. [730] However, he also acknowledged that limitations of freedom to travel or 'ordinary Stasi tyranny' could not be brought before a criminal court.[731] Asked if the difference between the people's 'sense of justice' and the criminal law could endanger the *Rechtsstaat,* he claimed that if functionaries be punished inappropriately low, East Germany's population could neither develop a 'sense of justice' would nor a 'moral renewal'.[732] *SUPERIllu* kept pushing for harder sentences for former elites, while remaining critical of trials against former border guards. However, when the *Landgericht Berlin* delivered the second verdict against Ingo Heinrich, this did not prompt significant reporting or commentary by the papers.[733]

[729] 'Honecker's Handlanger vor Gericht (…) – Warum kommen sie alle so glimpflich davon?', *SUPERIllu* (1994), No. 13, 24 March 1993.
[730] '(…) eine gewisse Blindheit (…) gegenüber dem, was das SED-Regime den Menschen angetan hat', *SUPERIllu* (1994) No. 13, 24 March 1994.
[731] 'gewöhnliche Stasi-Willkür', ibid.
[732] 'Rechtsempfinden' , 'sittliche Erneuerung', ibid.
[733] Cf. *SUPERIllu* in March 1994, Thüringer Allgemeine, 15 March 1994.

This was, of course, different when the FCJ confirmed the verdicts against the NVR members Streletz and Keßler and tightened the punishment against Albrecht in July 1994. Legally important, the FCJ differed from the regional court in seeing the NVR members not only as instigators and assistants to manslaughter, but as indirect perpetrators.[734] Commentators praised the verdict for its clear message, while acknowledging that it came late. *Berliner Zeitung's* Brigitte Fehler argued that the mild sentences and detailed reasoning proved that the *Rechtsstaat* was no 'instance of revenge'.[735] She thought that the verdict was an answer to resignation about an perceived imbalance in the prosecution of GDR state crime, and a reply to Bärbel Bohley's 'sarcasm'.[736] Earlier, Bohley had coined the phrase: 'We wanted justice, but we received the rule of law'.[737]

In the view of *Thüringer Allgemeine's* Ingo Linsel, the FCJ's ruling ended the 'incomprehensible' state where border guards had been sentenced to jail while former leaders remained free.[738] Linsel saw the verdict as an indirect conviction of Honecker, Stoph and Mielke, against whom the proceedings had been closed due to health reasons. The author praised the FCJ for providing 'far more convincing' evidence that political leadership must never dare to violate basic norms and human rights.[739] In his comment, the symbolic interpretation of the ruling as a reference to the late Honecker's guilt was obvious as well as a critique of the judiciary for bringing leaders no earlier to justice.

---

[734] 'Mittelbare Täterschaft' instead of 'Anstiftung', see chapter 4.
[735] 'keine Instanz für Rache', Berliner Zeitung, 27 July 1994.
[736] 'Sarkasmus', ibid.
[737] A source for Bohley's statement has not been found to date. However, the phrase is regularly attributed to her, e.g. by the Federal President Joachim Gauck in: Bundespräsidialamt: Bundespräsident Joachim Gauck anlässlich des 70. Deutschen Juristentages am 16. Januar 2014 in Hannover, <https://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2014/09/140916-Rede-Juristentag.pdf;jsessionid=888C8DF59616C1562875953CC29BC9B1.2_cid371?__blob=publicationFile>, last access: 5 July 2019.
[738] 'unverständlich', Thüringer Allgemeine, 27 July 1994.
[739] 'weit überzeugender', ibid.

Oldenburgische Volkszeitung's commentator Jörg Respondek also interpreted the verdict as a 'posthumous conviction of Erich Honecker', but was full of praise for the judges' decisions.[740] For him, the ruling was 'a prime example of the only correct way of coming to terms with the past in Germany'.[741] He lauded that former GDR leaders would face prison sentences and thought the verdict as a decisive step 'on the way to the ultimate achievement of Germany's inner re-unification'.[742]

The Federal Constitutional Court's Decision in the eyes of the Public, 1996

The Federal Constitutional Court's decision that trials against border guards and former elites did not violate the Basic Law's prohibition of retroactive punishment was met with praise. *Berliner Morgenpost's* Dieter Opitz viewed the decision as an 'impressive victory of the *Rechtsstaat'* in a situation where it had to reconcile 'written law, a sense of justice and [material, P.E.] justice'.[743] In *Thüringer Allgemeine,* Thomas Rothbart showed his surprise about this decision after 'all the mishaps' of the past years, clearly referring to Honecker's release. However, despite his satisfaction with the ruling, he argued that many injustices of the GDR 'cannot be grasped with legal means'.[744]

In the *Berliner Zeitung,* Dieter Schröder expressed his hope that further verdicts against marksmen ('*Todesschützen'*) could be achieved, while unorthodoxly claiming that prison sentences for military leaders were not as important. He also noted that an international court hardy could have come to another decision than the FCC; but in his eyes, an international verdict might have been 'more elegant', as

[740] 'posthumer Schuldspruch gegen Erich Honecker', Oldenburgische Volkszeitung, 27 July 1994.
[741] 'Musterbeispiel für einzig richtigen Weg der Vergangenheitsbewältigung in Deutschland', ibid.
[742] 'auf dem Weg zur endgültigen Verwirklichung der inneren Einheit Deutschlands', ibid.
[743] 'eindrucksvoller Sieg des Rechtsstaates, dem die häufig schwierige Aufgabe auferlegt ist, geschriebenes Recht, Rechtsempfinden und Gerechtigkeit in Einklang zu bringen', Berliner Morgenpost, 13 November 1996.
[744] 'all den Pannen', 'Doch vieles ist mit juristischen Mitteln nicht faßbar.' Thüringer Allgemeine, 13 November 1996

it would have 'ruled out any suspicion of vengeance from the outset'.[745] This was one of only few comments which contemplated the possibility of subjecting GDR state crime international courts or tribunals.

Late Justice: The Politbüro Trial, 1995-1999

After the regional court's judgement in the Politbüro trial, which saw Egon Krenz sentenced to six and a half years, and Günter Schabowski and Günther Kleiber both sentenced to three years in prison, commentators of our sample newspapers were by and large positive. Writing in *Thüringer Allgemeine*, Thomas Rothbart argued it had been high time for the mail culprits to be brought to justice. In his view, the verdict demonstrated a 'rechtsstaatliches Augenmaß'. [746] Writing in a more sceptical tone, *Oldenburgische Volkszeitung*'s Wolfgang Fechner believed that the acting court had been judging on 'a fine line between right and wrong'.[747] Still, he claimed it was right for Krenz and others to be convicted as they had 'condoned cowardly murder' at the Wall and the Inner German border. Thus, in his view, the verdict was neither revenge nor victor's justice.[748]

The notion that such a trial was a challenge for a criminal court was widely shared by commentators. Writing for *Berliner Morgenpost,* Rudolf Stiege stated that the past could not be 'mastered' with the criminal law.[749] Still, he commended the *Rechtsstaat* for 'trying to do its duty (…) in a sea of legal, political and psychological difficulties'.[750] *Berliner Zeitung*'s Christian Bommarius interpreted

[745] 'Aber vielleicht wäre ein solches Urteil eleganter gewsen, weil es von vornherein den Racheverdacht ausgeschlossen hätte', Berliner Zeitung, 13 November 1996.
[746] This appears to be a non-translatable phrase suggesting that a proportionate judgement had been delivered, see Thüringer Allemeine, 26 August 1997.
[747] 'schmaler Grat zwischen Recht und Unrecht', Oldenburgische Volkszeitung, 26 August 1997.
[748] 'feigen Mord an Mauer und Stacheldraht geduldet', ibid.
[749] 'Die Vergangenheit kann nicht mit strafrechtlichen Mitteln aufgearbeitet werden', Berliner Morgenpost, 26 August 1997.
[750] 'In einem Meer von juristischen, politischen und psychologischen Schwierigkeiten hat der Rechtsstaat versucht, seine Pflicht zu tun.' ibid.

the ruling as a 'modest triumph of human rights' over state crime: 'To date, a life in prison followed a murder, and a place in the book of history was the reward for hundreds or thousands counts of murder.'[751] He also thought the case had shown the limits of the criminal law's suitability in coming to terms with the past. He used this occasion to put the border guard cases in the context of international debates about sanctioning state crime. In his view, the *Politbüro* case had highlighted that '(…) to date, there is no binding international criminal law sanctioning crimes against humanity'.[752]

Fittingly, the FCJ delivered its confirmatory decision in the *Politbüro* case on 8 November 1999, in time for papers to comment on the verdict in the issue covering the 10th anniversary of the fall of the Wall. Through this coincidence, the ruling received a great deal of attention and was, perhaps, something like a preliminary endpoint of the border guard cases, even though the European Court of Human Rights' ruling was still to come, as were some trials against border guards. Berliner Morgenpost's commentator Oliver Michalsky called the FCJ's confirmatory vote 'fair and measured'.[753] He believed the judgement would do well for the public's sense of justice, especially after the 'many' verdicts against border guards. For him, the sentences were neither too harsh nor too mild. He decisively rejected any claims of former PDS politicians that 'the West' tried to 'delegitimise' the GDR; in his view, the former republic had delegitimised itself and history had judged Egon Krenz and his comrades.[754] Berliner Zeitung's Christian Bommarius praised the FCJ for not attempting to adjudicating on 'subversion and arbitrariness, terror and

[751] 'Bisher stand auf einen Mord lebenslang, auf hundert- oder tausendfachen Mord hingegen ein Eintrag ins Geschichtsbuch.', Berliner Zeitung, 26 August 1997.
[752] '(…) bis heute gibt es kein verbindliches internationales Strafrecht, das staatliche Verbrechen gegen die Menschlichkeit sanktionierte', ibid.
[753] 'gerecht und maßvoll', Berliner Morgenpost, 9 November 1999.
[754] ibid.

bugging'. In his view, decades of a dictatorship could not be 'mastered' by the criminal law.[755] In his view, the role of the Rechtsstaat was not to 'charge systems and to judge ideologies', but to assess individual guilt. This, Bommarius argued, marked the limits of the rule of law.[756] He also argued that the criminal law could satisfy victims of the GDR; this could only be done by state action such as compensations for wrongful imprisonment or disadvantages suffered in the GDR.[757] A stark divide in coverage was obvious: the Oldenburgische Volkszeitung merely printed one report on page 1, Thüringer Allgemeine and Berliner Zeitung both dedicated background stories to the trial, but also to the history of Border Guard Trials, to the GDR's chain of command, and to voices of victims' relatives.[758]

The last Hurrah: The verdict of the European Court of Human Rights

Egon Krenz's last chance lay in Straßburg, with the European Court of Human Rights (ECtHR). The Court's decision marked the last peak of press coverage of criminal trials against former GDR officials, as this was the end of all high-profile cases. The events invited commentators not only to share their opinion on the judgement at hand, but also to review the trials against elites and border guards altogether. After the verdict, Egon Krenz' claimed that he had gotten his judgement, but not his rights. Hans Modrow, honorary chairmen of the PDS and at the time a Member of the European Parliament also dismissed the ECtHR's judgement as 'political' and 'disillusioning'.[759] Thüringer Allgemeine's Manfred Maahs dismissed the claims. He argued that in the GDR, Krenz and his comrades would have received much harsher sentences. He believed that not upholding the judgement against Krenz would have been a 'mockery' for the victims.[760]

---

[755] '(…) Vergeblichkeit, Zersetzung und Willkür, Terror und Bespitzelung strafrechtlich zu beurteilen.' ; 'aufarbeiten', Berliner Zeitung, 9 November 1989.
[756] Der Rechtsstaat 'klagt nicht Systeme an und verurteilt keine Ideologien', ibid.
[757] ibid.
[758] See Thüringer Allgemeine and Berliner Zeitung, 9 November 1999.
[759] Thüringer Allgemeine, 23 March 2001.
[760] 'Hohn', ibid.

Commenting for Berliner Zeitung, Christian Bommarius, he defended the whole concept of criminal trials against GDR officials. Not to prosecute them would have been a 'retroactive surrender to the GDR regime's crimes, a relinquishment of human rights by the judiciary, and the discreditation of the revolution of 1989'.[761] In his view, the ECtHR's international character confirmed that the verdicts against Krenz and others were no case of victor's justice. In his words, there had rarely been a 'better day for human rights'.[762]

Opinion Polls

After German re-unification, the political and economic order faced different levels of political support among the population. As we will see below, former GDR citizens were significantly more critical of certain political circumstances than their West German counterparts.[763] Opinion polls from the mid-1990s suggest that the political system of the Federal Republic had failed to gain legitimacy among East-German citizens. A comprehensive poll conducted in 1995 suggests significant dissatisfaction with political outcomes and therefore indicates a lack of 'output legitimacy' as early as 1995. In that year, fifty-three per cent of East Germans described the social system of re-united Germany as 'unjust', while only twenty-eight per cent of West Germans subscribed to that view. Among those East Germans who viewed the FRG as 'unjust', forty-one per cent indicated that 'social injustice' was the main driver in their perception.[764] The frustration about the current system was even greater when it came to protection against crime: eighty-eight per cent of respondents in the former East said they believed that protection against crime was better in the GDR that in re-united Germany.[765]

---

[761] '(…) die nachträgliche Kapitulation vor den Verbrechen des DDR-Regimes bedeutet, die Preisgabe der Menschenrechte durch die Justiz und nicht zuletzt die Diskreditierung der Revolution von 1989', Berliner Zeitung, 23 March 2001.
[762] ibid.
[763] Gabriel, Einstellungen.
[764] Noelle-Neumann, Rechtsbewußtsein, 128.
[765] ibid.

Where a new political system fails to deliver satisfying outcomes, that is, where no 'output legitimacy' can grow, a support of the political system grounded in the way political preferences are being processed, can hardly emerge ('input legitimacy').[766] In fact, the same comprehensive *Allensbach* poll has suggested that in February 1995, 41 per cent of East Germans agreed to the following statement:

> 'I am firmly convinced that our society is inexorably heading for a major crisis. We cannot solve these problems with the current political possibilities. We can only do that if we fundamentally change our political system.'[767]

This suggests a major alienation of significant parts of East Germany's society from the body politic. In the West, by contrast, thirty per cent agreed to the statement. Likewise, support of the majority principle differed in East and West: In the former GDR, only thirty-six per cent of respondents said that democratic decisions of a municipal council (such as building a factory) had to be respected at all times, whereas forty per cent said that council decisions could be opposed by citizens, if need be by force.[768] In the West, a similarly high thirty-nine per cent thought that continued opposition against majority votes were legitimate, while forty-four per cent thought that majority votes had to be respected.[769] However, it must be noted that since 1982, West Germany had also seen a significant decline in support of the majority principle.

---

[766] Gabriel, Einstellungen, p. XXY.

[767] *'Ich bin fest davon überzeugt, daß unsere Gesellschaft unaufhaltsam auf eine ganz große Krise zusteuert. Mit den derzeitigen politischen Möglichkeiten können wir diese Probleme nicht lösen. Das schaffen wir nur, wenn wir unser politisches System grundlegend ändern.*', Noelle-Neumann, Rechtsbewußtsein, 150.

[768] ibid., 142f.

[769] ibid.

Frage: „Könnten Sie mir bitte für jeden der folgenden Punkte sage, ob Sie das in jedem Fall für in Ordnung halten, oder unter keinen Umständen, oder irgendwo dazwischen. Gehen Sie bitte nach diesem Bildblatt vor: 1 würde bedeuten, das darf man unter keinen Umständen tun; 10 würde bedeuten, das ist in jedem Fall in Ordnung."
(Vorlage eines Bildblattes)

	Westdeutschland				Ostdeutschland			
	1981** %	1990** %	1994 %	1995 %	1990** %	1992** %	1994 %	1995 %
*Das darf man auf keinen Fall tun** – Auszug aus den Angaben –								
Kein Fahrgeld in öffentlichen Verkehrsmitteln zahlen, schwarzfahren	80	78	78	75	93	89	85	80
Steuern hinterziehen, wenn man die Möglichkeit hat	76	68	67	63	88	78	72	63
Geld behalten, das man gefunden hat	73	62	52	55	69	58	51	53
Wenn man für den eigenen Vorteil lügt	65	56	45	44	69	61	47	43

* Technisch ausgedrückt wurden auf einer Skala von 0 = „Das darf man auf keinen Fall tun", bis 10 = „Ist vollkommen in Ordnung" die Punkte 1 bis 3 gewählt
** Bevölkerung ab 18 Jahre

Quelle: Allensbacher Archiv, IfD-Umfragen 1295, 2287, 3211, 3221, 6001, 6012

Figure 1: *'Can you please tell me for each of the following points whether you think this is okay in any case, or under no circumstances, or somewhere in between.'* (Source: Noelle-Neumann, Rechtsbewußtsein, 145.)

Data also show a gradual but constant erosion of values with regard to money and benefit taking. In 1990, ninety per cent of East Germans thought that fare dodging was not acceptable at all; eighty-eight per cent found it unacceptable to evade taxes, and sixty-nine per cent thought that keeping found money or lying for one's one benefit were not okay. These approval rates declined significantly over the next five years. As the data show, the erosion of such values was clearly more advanced in West Germany by 1981 than in East Germany by 1990. This suggests that the erosion of social values might not have been linked to East Germany's transformation, but it demonstrates what a huge social transformation took place

during the 1990s.[770] So, when we conclude that by the mid-1990s, the 'system' of re-united Germany was already lacking political support among the population of East Germany, what had this to do with transitional justice measures?

A major opinion poll on the success of transformative measures presents a differentiated picture. In November 1996, Allensbach conducted a representative opinion poll asking Germans what they believed had helped or hindered German unity.[771] In this poll, fifteen per cent of West Germans and only eight per cent of East Germans believed that criminal trials against 'ordinary border guards' had helped German unity. By contrast, fifty per cent of West Germans and sixty-two of respondents in the East believed that these proceedings had hindered unity.[772] Furthermore, only thirty-nine per cent of East Germans perceived a suggested 'lack' of trials against former leaders as an obstacle to German unity. By contrast, sixty-three per cent of West Germans thought so. This allows two interpretations. Firstly, it might well be that verdicts in the NVR case as well as other senior cases now no longer suggested an imbalance in trials to the detriment of rank-and-file border guards. By 1996, the claim that only 'small men' be hanged was no longer accurate. Secondly, and more likely in the light of the other figures, is the assumption that in 1996, using criminal law was seen as a problematic measure of transitional justice. Other measures, such as the BStU, was not seen critically. Forty per cent in East and West Germany thought positively about its contribution to unity, while only

[770] Noelle-Neumann, Rechtsbewußtsein, 145.

[771] The question asked was: 'Wenn Sie einmal auf die Entwicklung in Deutschland seit dem Fall der Mauer zurückblicken: Was ist vorteilhaft, was hat bislang die Einheit gefördert, und was hat belastet, ist schädlich für die Einheit, und was spielt keine Rolle?'
Opinion poll: 'Einheitsstützen – Einheitshemmnisse', in: Allensbacher Jahrbuch für Demokratie 1993-1997, Bd. 10, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saus 1997, p. 558-59.

[772] ibid.

seventeen or twenty-one per cent respectively saw it negatively. It was neither seen as a big obstacle to German unity, nor as a big factor behind it.[773]

However, data from social sciences suggest that the law – in a wider sense – seemed to play an important role in the wider public's perception of German unity. In the light of these data, the law has failed to play an integrative role after German re-unification.[774] Fifty per cent of West Germans believed that the 'immediate' adoption of West German law had helped German unity, while sixty-one per cent of East Germans thought it was impeding unity. This was despite the fact that in socially sensitive issues like abortion, former GDR regulations (which were more liberal) remained in force until a consensual criminal law reform could be agreed upon in Bundestag. Moreover, fifty-eight per cent of East Germans agreed that it was an obstacle that the Basic Law – (West) Germany's constitution – had not been revised in the process of or after reunification. Likewise, public opinion on criminal jurisprudence and the protection from crime suggest that the law failed to offer an integrative narrative to East Germans. In 1995, sixty per cent of East Germans said they were 'dissatisfied' with 'our laws and the jurisprudence'.[775] Only sixteen per cent in the former East were satisfied, whereas in the West, thirty-six per cent indicated they were dissatisfied and forty-seven per cent said they were satisfied.[776] Likewise, fifty-four per cent of West Germans perceived themselves as 'protected' by the law and though that 'on balance, one can live safely in Germany', thirty-six

[773] ibid.
[774] Opinion poll: 'Einheitsstützen – Einheitshemmnisse', in: Allensbacher Jahrbuch für Demokratie 1993-1997, Bd. 10, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saus 1997, p. 558f.
[775] 'Sind Sie mit unseren Gesetzen und der Rechtsprechung in Deutschland alles in allem zufrieden oder nicht zufrieden?'
[776] Tabelle 1, Geteiltes Rechtsbewusstsein in West und Ost, in: Noelle-Neumann, Elisabeth: 'Rechtsbewußtsein im wiedervereinigten Deutschland', in: Zeitschrift für Rechtssoziologie 16 (1995), No. 2, pp. 121-155, [p. 124]

per cent disagreed. In the East, the picture was reversed: merely sixteen per cent felt safe, while a remarkable seventy-two per cent indicated they felt unsafe.[777] Regarding police, the figures were even worse. Seventy-six per cent of East Germans were dissatisfied with the protection offered by police, only thirteen per cent were satisfied. While West Germany also saw forty-four per cent saying they were dissatisfied, at least forty-three per cent felt protected.[778] In the same vein, fifty-two per cent of East Germans agreed that 'felons are better protected than ordinary citizens'.[779] In the West, this figure was only thirty-six per cent.[780] These findings were confirmed by another poll in 2001 when fifty-three per cent of respondents in East Germany claimed that 'laws and regulations' had 'worsened' after re-unification. Even eighty-eight per cent believed that the protection against crime had 'worsened'.[781]

Likewise, questions about human rights reveal stark differences between Germans in the former West and East, once again suggesting that the law and the idea of 'Rechtsstaat' had not been able to integrate two societies within five years after re-unification. When asked which political system had protected human rights and human dignity better, ninety per cent of West Germans favoured the FRG, only one per cent thought the GDR had been the more credible advocate for human rights. In the East, the picture was much more blended. Here, only thirty-five per cent thought the FRG a human rights stronghold, while twenty-one per cent still thought so of the GDR.[782] The same poll also asked respondents what human right would come first to their mind. Out of 180 replies, thirty-five East Germans

[777] Noelle-Neumann, Rechtsbewußtsein, 124.
[778] Noelle-Neumann, Rechtsbewußtsein, 124.
[779] 'Manche sagen: 'In unserem Staat wird ein Verbrecher besser geschützt als die normalen Bürger.' Finden Sie, das trifft zu, oder trifft das nicht zu?' Noelle-Neumann, Rechtsbewußtsein, 125.
[780] Noelle-Neumann, Rechtsbewußtsein, 125.
[781] Allensbacher Jahrbuch für Demokratie 1998-2002, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saur 2002, p. 515.
[782] Noelle-Neumann, Rechtsbewußtsein, 133.

mentioned a 'right to work', whereas thirty-two per cent of West Germans referred to 'freedom of opinion' and 'freedom of speech'. These two specifications were the most frequently made statements in those two respective groups of respondents.

To sum these aforementioned findings up: by the mid-1990s, the criminal law as a means of transitional justice had largely lost public support, in West and East, but more so in the former GDR. However, not all forms of transitional justice were seen so negatively, as somewhat indifferent responses to the work of the BStU have shown. At the same time, the failure to adopt a new constitution as a powerful political symbol, as well as the perceived lack of legal certainty and protection against crime suggest that the new social and political order had failed to gain substantive support among East Germans. 'The law' – in its widest sense – had failed to become an integrative power, despite politicians' claims that the East Germans would have longed for the West German *Rechtsstaat* (see chapter 2).

The least favourable results, however, were measured in the field of the economic transformation, where Germans – and especially East Germans – were particularly critical of how re-unification had been handled. Sixty-seven per cent of East Germans thought that the restitution of expropriated properties had hindered German unity (West Germans: forty-eight per cent).[783] Seventy-seven per cent of East Germans claimed that German re-unification suffered from discontinuing social welfare 'achievements' of the GDR (West Germans: fifty-three per cent).[784] The way how the Treuhand had privatised East German companies and the alleged failure to protect East German businesses against competition from the West were seen especially critical by East Germans (eighty-three and seventy-nine per cent, respectively).[785]

[783] Opinion poll: 'Einheitsstützen – Einheitshemmnisse', in: Allensbacher Jahrbuch für Demokratie 1993-1997, Bd. 10, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saus 1997, p. 558f.
[784] ibid.
[785] ibid.

As a preliminary conclusion, it seems fair to say that the policies of transitional justice were not dismissed in total, but restitutions, the use of the criminal law, and the adaption of the Basic Law were received with criticism by East Germans. However, it is important to note that economic measures of the post-socialist transformation gained much less support and provoked significantly more opposition.

Summary

The press generally welcomed criminal trials as a measure of transitional justice, but remained distanced towards proceedings against 'foot soldiers'. Verdicts against former leaders were commented sympathetically. However, it was criticised that these verdicts came relatively late. Moreover, Honecker's release drew fundamental criticism. This demonstrates the conflicts between the requirements of criminal proceedings on the one hand, and outcome expectations of the public on the other. While press comments regularly acknowledged that the limits of the criminal law in 'overcoming' Socialism, some texts also linked those trials against rank-and-file border guards to the public's sense of justice. This reflects that the 'border guard cases' were no mere technical application of the criminal law, but a conglomerate of proceedings in need of legitimacy and justification.

Citizens' reactions from 1991 and 1992 revealed frequent dissatisfaction with the fact that border guards such as Ingo Heinrich had been charged, while proceedings against Honecker and the likes had not been opened yet. Courts eventually developed a taxonomy of sentences which accommodated public demands for punishing political and military leaders much more severely than 'ordinary' border guards. But, as demonstrated above, this taxonomy suffered from two flaws. Firstly, it was never communicated as a strategy, but had to be understood by studying the jurisprudence. Secondly, the taxonomy became obvious only over the course of time, as more and more verdicts were handed down. Given that the proceedings against former GDR officials took place in the ordinary judiciary, a more politicised

style of legal communication would have been inconsistent with the character of the legal system. But it came at the price of a de-politicisation of a profoundly political process, the question of how to deal with the legacy of a dictatorial past. The lack of political resolution and public communication of this central aspect of transitional justice may have undermined the cause of integrating East Germans into the new society which was so overwhelmingly dominated by West German culture and politics.[786] However, it needs to be noted that few letters also suggested alternative forms of transitional justice, including commending those former GDR officials who had refused orders which – in their views – constituted political crimes.

In any case, representative opinion polls show that by the mid-1990s, the paradigm of criminal justice had been largely dismissed by Germans in the former East. This was especially true for trials against 'ordinary' border guards. Moreover, the law, the Basic Law and even terms like 'Rechtsstaat' had become important categories of identity construction and the negotiation of value conflicts. Largely differing polling results between East and West Germany also suggested a continued fracturing in political views in the re-united country.

What is the meaning of the so-called border guard cases for the process of Inner German unity, then? As measures of transitional justice, the trials against former GDR officials failed to deliver legitimacy and political support for the new state. While arguably, the economic transformation was an even heavier strain on East Germany's 'collective soul', the trials themselves also provoked opposition and rejection, especially among the East-German population. Moreover, repetitive

[786] Gerhard Sälter has even argued that there might have been a grand strategy behind this, that the only reason the border guards were prosecuted might have been to be able to get to Krenz, Mielke and so on. Cf. Sälter, Rechtsstaat. However, this implies too much of a coordinated attempt – after all, legal affairs fall into the competence of states, and the 'border guard cases' were carried out in state courts and by state prosecutors. There was neither a Federal authority coordinating this nor any political resolutions or parliamentary votes which would have mainstreamed a legal strategy.

media coverage may have served as a perpetual reiteration of a normative de-valuation of the GDR and a demarcation of its 'wrongful nature'. Some citizens' reactions as well as press comments suggest that in the eyes of some, this was generalised into an outright degradation of their past lives and their experiences. Against the backdrop of a grave economic situation and a frustrating social and economic transformation, it might have been important to develop strategies to win public support for the new state and system, to create legitimacy among East Germans. Towards this end, a more integrative strategy of reconciliation and symbolic appreciation might have been more helpful in supplying support for an otherwise already stressful transformation. Criminal prosecution of state leaders could still have been part of this if it had been part of a larger and politically defined consensus on how to 'master the past'. The de-centralized and de-politicised trials that took place instead were not only dogmatically problematic, but also politically and symbolically disliked and hence counterproductive.

Conclusion

This study set out to historicise the border guard trials as an instance of post-Socialist transitional justice. It asked how the proceedings were historically framed by attempts to 'come to terms' with the Nazi past, and ideologically shaped by Cold War confrontations and ideologies. Moreover, this dissertation examined the political and societal echoes of these trials and located them in the wider context of post-dictatorial transitional justice tools deployed in East Germany after the end of the SED regime.

Chapter 1 has shown that using the criminal law against former GDR officials was institutionally foreshadowed by West Germany's *Zentrale Erfassungsstelle der Landesjustizverwaltungen* (*ZESt*) in Salzgitter. Founded as a reflex response to the construction of the Wall, the *ZESt* became an important institutional precursor of the Border Guard Trials. Designed to keep track of all 'state crimes' of the GDR for future criminal prosecution in the West, the office soon became an embodiment and permanent institutional expression of West German normative positions during the Cold War, i.e. the total rejection of the GDR's existence and state practices, especially at the Inner-German border. The debate on the legal basis of the office's work, growing in intensity between the mid-1960s and mid-1980s, became a focal point for competing Cold War conceptions of illegality and state crime not only within West Germany, but also in the system conflict between the Federal Republic and the German Democratic Republic. After re-unification, the office's 40,000 investigative files, a product of diplomatic necessities and a 'conservative' ideological hegemony, were transformed into an unforeseeably powerful legal resource, overshadowed, perhaps, only by the significant ideological framing which the office's existence had exercised for decades.

However, criminal prosecution of GDR officials also took place in a line of continuity of legal action and public demands in the GDR between 1989 and 1990, as chapter 3 has demonstrated. In written demands, citizens most notably called for investigations into cases of voter fraud, corruption, and the misappropriation of public goods for private luxuries, thereby showing specific priorities of justice clearly different from the ones embodied in the *ZESt*'s work and prevalent in the jurisprudence after re-unification. Despite severe transformations and various challenges, the GDR's judiciary demonstrated responsiveness to public demands by convicting fifteen former leaders and issuing eleven penalty orders. In other words: these early judicial attempts were a strategy of reckoning that was demanded and conducted by East Germans themselves, and not a case of West German victor's justice. Rather, these trials were a procedural expression of the intention of GDR state prosecutors that the criminal law *could* and *ought to* play a role in the reckoning with former elites – albeit not necessarily with rank-and-file officials such as border guards.

These potentially conflicting approaches as to who ought to be the target of criminal trials in a transitional justice-sense were not resolved politically, as chapter 2 has argued. In the light of an overwhelming political consensus after re-unification, no deliberate political decision in favour of using the criminal law as a transitional justice tool was taken. Rather, the necessity of criminal proceedings was seen as an almost unquestionable axiom. On a political and symbolic level, and in the absence of a genuine political resolution, the legislative proceedings on the extension of limitation periods served as a 'surrogate debate' on the paradigm of criminal prosecution as a transitional justice tool. The passing of both bills therefore has to be understood as a retroactive justification and legitimisation, as an act of legal enabling and political contestation of this form of transitional justice. These parliamentary debates encapsulated a political resolution in favour of criminal trials; but they were held after the first verdicts had been delivered by the judiciary. The laws on limitation periods came to be the most visible statement of a joint

political will, disguised as inevitable factual necessity. Because although the use of criminal trials was claimed to be inevitable, it was not. As some remarks have demonstrated, other forms of revolutionary tribunals had been possible, not to mention a 'forget and forgive' gesture, or a ban on criminal prosecution.

Eventually, it was resolved that for all political crimes in the GDR, limitation periods would not begin before 3 October 1990, and that minor crimes would not lapse before 31 December 1995, medium-heavy crimes not before the end of 1997. These regulations included 'minor' crimes such as trespass or invasion of privacy which may not have been as gruesome as killings but were still essential for the running of the dictatorship. Likewise, it was agreed to include certain forms of economic crimes in East Germany *after* re-unification, as these were believed to have contributed to the economic difficulties experienced by many Germans in the former East.

In justifying the draft legislation, legislators referred to an alleged legal common sense, suggesting that the outcomes of criminal trials had to be intelligible to the wider public and that the popular will should be taken into account, at least to a certain degree. In these demands, technical-legal considerations became deeply intertwined with fundamental political views and normative claims. Moreover, legislators in favour of criminal trials and extending limitation periods echoed early verdicts. They also claimed that criminal courts were merely enforcing GDR law, thereby downplaying any challenges to the legitimacy of the proceedings. Those in favour of this argument did usually not, however, explain why the re-united country should care to enforce laws of a state which was described as an '*Unrechtsstaat*'.

How deeply these debates were historically framed was made evident in ample references to (West) Germany's attempts to 'come to terms' with the Nazi past after 1945. Even though most speakers made clear that they did not wish to equate the 'Third Reich' with the GDR, a subtle invocation of the paradigm of ‘totalitarianism’ and a certain degree of comparability are hard to dismiss. This argument was therefore repeatedly criticised by left-of-centre politicians. Over time, conservative

speakers grew increasingly sensitive in making this point. A specific way of referencing National Socialism was to point out that after what was perceived as a failed prosecution of Nazi perpetrators, the GDR's *'Aufarbeitung'* presented a 'second chance' of 'mastering' a German dictatorship. Repeatedly, speakers warned that Germany should not repeat the mistake of 'sweeping the past under the carpet'. The perceived failure of 'mastering' the Nazi past therefore advanced to a strong argument to 'get it right' this time. By contrast, warnings that a criminal-justice-based approach could adversely affect East Germany's transformation and integration into re-united Germany were only uttered by the PDS, who argued that widespread fears of criminal prosecution could distress East Germans who were burdened with a frustrating economic transformation even further.

A *Bündnis 90/Die Grünen*-speaker was the only parliamentarian who vindicated criminal trials with reference to emerging international human rights regimes since World War II. It will be a fruitful field of research to examine what impact these debates, as well as the jurisprudence, in re-united Germany have had on international legal and diplomatic debates on state crime, for example the establishment of the International Criminal Court in The Hague. Another question for future research is to what extent the paradigm shift in Germany's jurisprudence on former KZ guards, as witnessed since the Demjanjuk Trial in 2009, has been influenced by transitional justice practices and debates after the end of the GDR.

Chapter 4 has examined how German courts tried to navigate in difficult waters in the Border Guard Trials. Their jurisprudence had to satisfy diverging demands of different societal 'systems'. For the legal system, jurisprudence had to be thoroughly substantiated and sealed against legal challenges such as the prohibition of retroactive punishment. At the same time, public expectations of the outcome had to be accommodated, at least to a certain extent, if the judiciary did not want to provoke allegations of letting former GDR perpetrators off the hook. And politicians formulated the expectation that criminal trials should contribute to the societal effort of 'coming to terms with the past'. Statistics have shown that post-

reunification trials put emphasis on investigating and prosecuting killings at the border and abuse of justice. Chapter 3, on the other hand, has demonstrated that pre-reunification trials have focused on elite crimes such as voter fraud and economic crimes. Where GDR state prosecutors predominantly charged former leaders, re-united Germany's judiciary also extensively prosecuted subordinates. Before the GDR acceded to the FRG, just over 100 persons had been charged for state crimes. These were mainly state elites, senior party figures, and trade union leaders. By contrast, between German re-unification in 1990 and 2005, re-united Germany's judiciary investigated no less than 100,000 individuals, with 1,737 of them being eventually charged.[787] These differences were an expression of different justice priorities. After re-unification, criminal investigations and trials were no longer a tool to vent the public's frustration about the schemes of ousted rulers; they advanced to a potential threat to many former GDR officials whose staunch or tacit work had been decisive for the survival of the GDR.[788]

Subsequently, this research project has used criminal trials against former GDR border guards and their superiors, including state and military leaders, as a case study into the judicial practice of transitional justice after German re-unification. Towards this end, a small sample of test cases has been analysed with respect to how the judiciary has attempted to develop a coherent and legally watertight jurisprudence, while taking into account expectations from the public and the political sphere. The key challenge was to establish why the acts had been illegal and hence punishable, as well as to invalidate claims that convictions violated the prohibition of retroactive punishment (*nulla poena).* The first two verdicts in early 1992 encapsulated a conflict over the legal foundations of these trials which echoed competing views on the legitimacy of the GDR itself. The very first judgement disregarded GDR law and relied solely on natural law justifications for the

[787] Figures according to Marxen/Werle/Schäfter, Strafverfolgung.
[788] Weinke thoughtfully asks what the point of criminal trials as a transitional justice measure may be in a 'participative dictatorship', cf. Weinke, Transitional Justice, 251.

conviction. This included a reference to the Radbruch Formula. This legal principle had been developed in the wake of the Shoah in order to justify criminal convictions of regime perpetrators. It suggests that where positive law has been used to legitimise grave state crime, it must yield to 'justice' and be disregarded. The second verdict rejected this line of continuity from the 'Third Reich' to the GDR, and instead took positive GDR law very seriously. In a hyper-textual reading of legal provisions, it concluded that killings at the border had been illegal *even* under GDR law.

This conflict over competing conceptions of illegality in the realm of state crime was resolved by the Federal Court of Justice (FCJ) in November 1992. It confirmed the judgements insofar as the defendants had been convicted. The FCJ used an integrative approach that relied on a textual reading of GDR law, a consideration of international human rights obligations of the GDR, and on the Radbruch Formula. The choice for this comprehensive approach to the main question was honoured in 1996 and 2001 when the Federal Constitutional Court (FCC) and the European Court of Human Rights ruled that the convictions did not violate the prohibition of retroactive punishment as it is enshrined in Art. 103 (2) Basic Law and Art. 7 (1) ECHR.

On a symbolic level, the trials against former military and party indicated that former military and political elites were also liable for killings at the border. In this light, the FCJ's decision which ruled that those leaders had not merely instigated manslaughter, but were perpetrators themselves, was important. With these decisions, and over the years, it became obvious that the courts tried to accommodate individual levels of responsibility with a systematic taxonomy of sentences. However, this taxonomy became visible only in hindsight. Moreover, due to the complexity of investigations against former leaders, courts were faster to charge rank-and-file border guards than elites. With decreasing media coverage over time, this had a distorting effect on the courts' ability to communicate a tacit judicial strategy. This strategic disadvantage was further amplified when the

proceedings against Honecker had to be terminated due to their poor health, leaving behind a furious public.

The courts acted in a way which tried to do justice to the political dimension of the trials. Their acknowledgement that border guards such as Ingo Heinrich and others were 'in a way also victims'[789] of the border or the FCJ's intervention that identified senior leaders as perpetrators – as opposed to their initial conviction of instigating manslaughter – can be understood in such a way as to accommodate the public's expectations that 'foot soldiers' should not be the only ones punished for the injustices of Germany's socialist dictatorship. The courts' attempt to establish a taxonomy of sentences falls into the same category. In this context, the Radbruch Formula can be seen as a tool to help the FCJ deliver the outcome that common sense was considered to demand. In the challenge of mastering the Border Guard Trials, this legal principle served as a 'lubricant' to ensure the desired outcome.[790]

While the jurisprudence was *grosso modo* coherent, it was far from being uncontested, as Chapter 5 has shown. In a mixed-methods-approach, this chapter has studied how public opinion on the 'border guard cases' and transitional justice has evolved, and what ramifications can be identified. Towards this aim, a sample of regional newspapers has been examined, citizens' reactions have been studied, and opinion surveys have been analysed. All in all, nothing indicates that criminal trials against former GDR officials can be seen as a stabilising moment in East Germany's transformation. Judging from the sources scrutinised, chapter 5 has argued that the criminal law, in conjunction with other aspects of the

[789] Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55, [p. 155].

[790] The notion of a legal concept as a 'lubricant' has previously been used to describe the role of the 'margin of appreciation' in the jurisprudence on the European Convention of Human Rights, see Macdonald, Ronald St. J.: 'The Margin of Appreciatixon', in: Macdonald, Ronald St. J./Matscher, Franz/Petzold, Herbert (eds.): The European System for the Protection of Human Rights, Dordrecht/Boston/London: Martinus Nijhoff Publishers, pp. 83-124 [p. 122].

transformation, has failed to equip the new political, social and economic order of re-united Germany with political support among the population in the former GDR.

The press generally welcomed criminal trials. Proceedings against rank-and-file border guards, however, were seen with some critical distance. Nevertheless, convictions of state and military leaders were warmly welcomed, despite some criticism over the late point in time. Honecker's release, however, provoked a lot of criticism, as did the relatively late conviction of other leaders such as Krenz, and Streletz. Press comments also highlighted how trials against former leaders were related to proceedings against their inferiors in a general sense of justice and legitimacy. These texts exemplified that in public perception, trials against GDR officials were not a purely technical application of the criminal law, but a conglomerate of measures that was in need of justification and legitimacy. Journalists usually designated the limits of the criminal law in achieving *Aufarbeitung* of the past, but they mostly deemed it without alternative, anyway.

Citizens' reactions in the form of letters to authorities were surprisingly rare. Only about three dozen letters were written to the Federal President in 1991 and 1992, when the first trials were opened and closed.[791] Some letters supported criminal trials against border guards such as Ingo Heinrich and others, while many opposed them. The three major themes in this argument were the apparent international recognition of the GDR during the Cold War, even by the FRG; the notion of a legal dilemma when subordinates are confronted with an illegal military order; and the reproach that the judiciary would let big men run while hanging the small men. In 1991/92, these claims could legitimately have been made since low-ranking border guards were the first to be charged, and because the prosecution of GDR officials took place within the ordinary judiciary, not within a revolutionary

[791] By contrast, the broadcast of the TV-series 'Holocaust' provoked about 10,000 letters to the TV-station *WDR.* A selection of these has been published by Lichtenstein, Heiner/Schmid-Ospach, Michael (eds.): Holocaust. Briefe an den WDR, Wuppertal: Peter Hammer 1982. Cf. also Ebert, Impact.

tribunal of some sort. Therefore, the de-centralised judiciary was unable to communicate into the political arena if it pursued any strategy – which, arguably, it did, as the previous chapters have shown. When we contrast expectations as expressed by journalists and citizens with the argumentative style of the examined judgements, a tension becomes obvious between the requirements of the rule of law on the one hand and political calls for material justice on the other hand. This was the quandary in which the border guard cases were conducted.

An analysis of various polling data suggests that political support (or legitimacy) for the new system of the Federal Republic has remained low since the mid-1990s. Frustrating experiences of the economic transformation of East Germany, including mass unemployment, arguably constituted the most important cause for this in the early 1990s. However, chapter 5 has also shown that the law – in a broad sense – has been an important instance in the negotiation of value conflicts and, possibly, an important category of identity construction. Importantly, surveys have also shown that the 'border guard cases' were seen as an obstacle to German unity. By late 1996, the paradigm of criminal justice as a transitional justice policy had been largely dismissed by most East Germans. This study has therefore argued that criminal trials have served as a constant and reiterative reminder of transformative experiences which were perceived as degrading. Rather than delivering legitimacy, they contributed to undermining political support for the new system.

The border guard trials, as well as concomitant public and political debates provided a prism through which it became visible how politicians, courts, and the public have engaged with the potentially divisive tension between serving 'justice' and enabling 'reconciliation'. The project of a criminal reckoning with former GDR officials was inextricably intertwined with German efforts to 'master' the Nazi past. The precedent of West Germany's *Vergangenheitsaufarbeitung* of National Socialist crimes was crucial in forming verdicts and in determining who would be tried, and for which acts. Likewise, the West German precedent was a frequent argument in political debates. However, judges and politicians were aware of the

pitfalls of using arguments from the 1940s and 1950s, and qualified them accordingly.

It was, moreover, framed by residuals of Cold War ideology, and shaped by institutional and legal continuities embodied in the *ZESt.* However, criminal trials against GDR officials were also an expression of political preferences expressed during the GDR's revolutionary period, and a continuation of judicial practices of the period from November 1989 to October 1990. Tropes of 'victors' justice' and carpetbaggery notwithstanding, the use of criminal law as a measure of transitional justice originated (also) within East German society and was sustained and championed by the GDR's citizenship. This leading role of the GDR's own citizens in re-establishing an independent judiciary, and in the cases discussed here, is remarkable, as it demonstrates that the transitional justice tools deployed since 1989 were also shaped by East German agency. It is also remarkable because the law had been an instrument of repression in the GDR. It had been complicit with (even more sinister) forms of exercising the power to rule. It is therefore noteworthy that GDR citizens still turned to the judiciary to remedy the situation in the autumn and winter of 1989 and 1990.

In re-united Germany's process of post-socialist transitional justice, the criminal law regulated inherently political questions by transposing them into the legal sphere. However, the place where this happened was the ordinary judiciary, governed by statutory law and procedural requirements. Thus, inherently political questions were 'factored out' with the help of a 'fiction of normalcy' (K. Stengel), that was fostered by the use of 'ordinary' law. This way, the transitional context of these trials could be held at a distance, at least in the jurisprudence. As a consequence, the political system did not have to engage in the potentially divisive question of how to deal with the leaders (and perpetrators) of a former regime but could these decision on to the courts. However, the political dimension of these trials was perfectly obvious to politicians, journalists and the press, as this study has demonstrated.

The proceedings were undoubtedly seen and assessed in the wider context of transformative processes which East Germany experienced in the 1990s. In this context, the trials have not been a boost to public support for the new legal, social, and political system, but a liability. On 20 January 1992, when the verdict against Heinrich and Kühnpast was handed down, one citizen of Berlin put these entanglements into polite, yet plain words. For the sake of purity, they are reproduced in German:

> 'Schauen sie, Herr Bundespräsident, die Menschen in den östlichen Bundesländern haben es nicht leicht. So vieles ist neu, soviel macht unsicher, manches sogar Angst. Die Zukunft schwebt mit einer Menge Ungewissem über den Köpfen der Menschen hier, die Gegenwart bietet nur wenig Grund zur Freude. Und eine Vergangenheit gibt es entweder nicht mehr (weil es den Staat nicht mehr gibt), oder sie wird kriminalisiert. Sie sind oberster Repräsentant eines Systems, das jetzt auch für hier gilt. Vielleicht können Sie uns helfen, die Spielregeln besser zu verstehen.'[792]

[792] Written on 20 January 1992, the day of the first *Gueffroy* verdict. BArch B 122 / 56083, p. 50-52.

Sources and Bibliography

i) Archived Primary Sources

Bundesarchiv

BArch B 122 / 56083 (BRD – Bundespräsidialamt)

BArch B 141 / 33783 (BRD – ZESt)

BArch B141 / 33785 (BRD – ZESt)

BArch B 141 / 33786 (BRD – ZESt)

BArch B 141 /33787 (BRD – ZESt)

BArch B 141 / 104117 (BRD – ZESt)

BArch B141 / 116719 (BRD – ZESt)

BArch DP 1 / 22625 (DDR – Ministerium der Justiz)

BArch DP 1 / 22639 (DDR – Ministerium der Justiz)

BArch DP 1 / 22640 (DDR – Ministerium der Justiz)

BArch DP 3 / 1240 (DDR – Ministerium der Justiz)

BArch DP 3 / 1290 (DDR – Generalstaatsanwaltschaft)

BArch DP 3 / 1291 (DDR – Generalstaatsanwaltschaft)

BArch DP 3 / 1535 (DDR – Generalstaatsanwaltschaft)

Landesarchiv Berlin

LAB B Rep 002 (Senat von Berlin)

Parlamentsarchiv Deutscher Bundestag

PA-DBT 4000 XII/187 (Legislative Proceedings 1. Verjährungsgesetz)

PA-DBT 4000 XII/245 (Legislative Proceedings 2. Verjährungsgesetz)

ii) Printed Primary Sources

Newspapers

Berliner Morgenpost

Berliner Zeitung

Oldenburgische Volkszeitung

Thüringer Allgemeine

Opinion Polls

Allensbacher Jahrbuch für Demokratie 1998-2002, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saur 2002 [abbr. Allensbach, 1998-2002]

Allensbacher Jahrbuch für Demokratie 1993-1997, Bd. 10, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München: K.G. Saus 1997 [abbr. Allensbach, 1993-1997]

Allensbacher Jahrbuch der Demoskopie 1984–1992, ed. by Elisabeth Noelle-Neumann and Renate Köcher, München et al: K.G. Saur 1993 [abbr. Allensbach, 1984-1992]

Court Decisions

Beschluss des Bundesverfassungsgerichts vom 24.10.1996, Az. 2 BvR 1851/94; 2 BvR 1852/94; 2 BvR 1853/94; 2 BvR 1875/94, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 608-641.

Beschluss (Nichtannahme der Verfassungsbeschwerde) des Bundesverfassungsgerichts vom 12.1.2000, Az. 2 BvQ 60/99, 2 BvR 2414/99, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 910-13

Beschluss des Landgerichtes Berlin, 13 January – 514-35/92 –, in: Neue Juristische Wochenschrift 1993, p. 1608

Erneutes tatrichterliches Urteil des Landgerichts Berlin vom 14.3.1994, Az. (527) 2 Js 48/90 Ks (3/93), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 89-101

Erstinstanzliches Urteil des Landgerichts Stuttgart vom 11.10.1963 – Ks 14/63 –, in: Neue Juristische Wochenschrift 1964, no. 2, pp. 63-69.

Erstinstanzliches Urteil des Landgerichts Berlin vom 20.1.1992, Az. (523)2 Js 48/90 (9/91), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 5-70. [Gueffroy case]

Erstinstanzliches Urteil des Landgerichts Berlin, 5 February 1992, Az.: (518) 2 Js 63/90 KLs (57/91), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 105-134 [Schmidt case]

Erstinstanzliches Urteil des Landgerichts Berlin vom 16.9.1993, Az. (527) 2 Js 26/90 Ks (10/92), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 502-598 [NVR case]

Erstinstanzliches Urteil des Landgerichts Berlin, 25.8.1997, Az. (527) 25/2 Js 20/92 Ks (1/95), in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 645-890

European Court of Human Rights: Case of Streletz, Keßler and Krenz v. Germany (*Applications nos. 34044/96, 35532/97 and 44801/98*), 22 March 2001, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 914-37

Revisionsurteil des Bundesgerichtshofs, 3.11.1992, AZ 5 StR 370/92, BGHSt 39,1 (Mauerschützen I) –, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 135-55

Revisionsurteil des Bundesgerichtshofs, 25.3.1993, Az. 5 StR 418/92 , BGHSt 39 (Mauerschützen II), 168, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 1, Berlin/Boston: De Gruyter 2002, pp. 72-86

Revisionsurteil des Bundesgerichtshofs vom 26.7.1994, Az. 5 StR 98/94, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 598-607.

Revisionsurteil des Bundesgerichtshofs vom 8.11.1999, Az. 5 StR 632/98, in: Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, vol. 2, sub-vol. 2, Berlin/Boston: De Gruyter 2002, pp. 890-909.

Urteil des Landgerichts Berlin vom 10.9.1996 – Az. (536) 26/2 Js 15/92 Ks (2/95)

Urteil des Landgerichts Berlin vom 21.8.2000 – Az. (529) 27 Js 2/99 Ks (19/98)

Urteil des Landgerichts Berlin, 15.12.2000, Az. (536) 27/2 Js 299/91 Ks (2/2000)

Other printed primary sources

Dichgans, Hans: 'Zur Rechtsnatur des mitteldeutschen Regimes', in: Neue Juristische Wochenschrift 1966, no. 48, pp. 2255-57 [Dichgans, Rechtsnatur].

Dokumente zur Deutschlandpolitik', ed. by Michael Hollmann, Series 6, Vol. 6: 1 January 1979-31 December 1980, München: Oldenbourg 2015, pp. 796-800.

Grünwald, Gerald: 'Ist der Schußwaffengebrauch an der Zonengrenze strafbar?', in: JuristenZeitung 21 (1966), no. 19, pp. 633-38 [abbr. Grünwald, Schußwaffengebrauch].

Hamburgische Bürgerschaft, Ds. 11/2372, 2 May 1984, online available at: https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGD11-2372.pdf, last access: 15 September 2019.

Bürgerschaft der Freien und Hansestadt Hamburg, Plenary Protocol 11/42, 30 May 1984, online available at: <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/GGP11-42.pdf>, last access: 15 September 2019.

Radbruch, Gustav: Rechtsphilosophie, Stuttgart: K.F. Koehler ^{4}1950 [abbr. Radbruch, Rechtsphilosophie].

Rosenthal, Walter: 'Zur Strafbarkeit des Schußwaffengebrauchs an der Zonengrenze', in: Recht in Ost und West (ROW) 11 (1967), p. 7-11 [abbr. Rosenthal, Strafbarkeit].

iii) Printed Secondary Sources

Bibliography

Ahonen, Pertti: Death at the Berlin Wall, Oxford: Oxford University Press 2011 [abbr. Ahonen, Death].

Ahonen, Pertti: Unity on Trial: The Mauerschützenprozesse and the East-West Rifts of Unified Germany, in: Fuchs, Anne / James-Chakraborty, Kathleen / Shortt, Linda (eds.): Debating German Cultural Identity since 1989, Rochester: Camden House 2011, pp. 30-45 [abbr. Ahonen, Trial].

Ainley, Kirsten: ‘Evaluating the Evaluators: Transitional Justice and the Contest

of Values', in: International Journal of Transitional Justice 11 (2017), pp. 421-442 [abbr. Ainley, TJ].

Alleweldt, Ralf: *'Die Idee der gerichtlichen Überprüfung von Gesetzen in den Federalist Papers',* in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 56 (1996), pp. 205-39 [abbr. Alleweldt, Idee].

Bach, Jonathan: 'Vanishing Acts and Virtual Reconstructions: Technologies of Memory and the Afterlife of the GDR', in: Arnold-de Simone, Silke (ed.): Memory Traces. 1989 and the Question of German Cultural Identity, Oxford et al.: Peter Lang 2005, pp. 261-80 [abbr. Bach, Acts].

Bauerkämper, Arnd: Die lange Debatte über 'Crimes against Humanity'. Völkerrecht, die Rolle von Experten und zivilgesellschaftliche Mobilisierung, in: Neue Politische Literatur 63 (2018), No. 3, pp. 377-384 [abbr. Bauerkämper, Debatte].

Beattie, Andrew H.: 'The Politics of Remembering the GDR. Official and State-Mandated Memory since 1990', in: Clarke, David / Wölfe, Ute (eds.): Remembering the German Democratic Republic. Divided Memory in a United Germany, Houndsmills: Palgrave Macmillan 2011, pp. 23-35 [abbr. Beattie, Politics of Remembering].

Beattie, Andrew H.: *'An Evolutionary Process: Contributions of the Bundestag Inquiries into East Germany to an Understanding of the Role of Truth Commissions',* in: The International Journal of Transitional Justice 3 (2009), pp. 229-249 [abbr. Beattie, Process].

Beattie, Andrew H.: Playing politics with history. The bundestag inquiries into East Germany, New York et al.: Berghahn Books 2008 [abbr. Beattie, Playing politics].

Beetham, David: *'Legitimacy'*, in: International Encyclopedia of Political Science, vol. 5, edited by Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morino, London et al: Sage 2001, pp. 1414-1425 [abbr. Beetham, Legitimacy].

Beljan, Daniela / Lorenz, Matthias N.: Weizsäcker-Rede, in: Fischer, Torben / Lorenz, Matthias N. (eds.),: Lexikon der "Vergangenheitsbewältigung" in Deutschland. Debatten- und Diskursgeschichte des Nationalsozialismus nach 1945 (Bielefeld, 2007), pp. 232-35 [abbr. Beljan/Lorenz, Rede].

Bell, Christine: *'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"',* in: The International Journal of Transitional Justice 3 (2009), pp. 5-27 [abbr. Bell, TJ].

Berger, Stefan: On Taboos, Traumas and Other Myths: Why the Debate about German Victims of the Second World War Is Not a Historian's Controversy, in: Niven, Bill (ed.): Germans as Victims. Remembering the Past in Contemporary Germany, Houndmills / New York: Palgrave

Macmillan, 2006, pp. 210-24 [abbr. Berger, Myths].

Bethge, Herbert: *'Bundesrat. I. Rechtlich',* in: Staatslexikon der Görres-Gesellschaft, Vol. 1, 8th edition, Freiburg: Herder 2017, 825-830 [abbr. Bethge, Bundesrat].

Bialas, Wolfgang: Antifaschismus als Sinnstiftung. Konturen eines ostdeutschen Konzepts, in: Bergem, Wolfgang (ed.): Die NS-Diktatur im deutschen Erinnerungsdiskurs, Opladen: Leske & Budrich 2003, 151-170 [abbr. Bialas, Sinnstiftung].

Bier, Jean-Paul / Allinder, Michael: The Holocaust and West Germany. Strategies of Oblivion 1947-1979, in: New German Critique 19 (1980) 1, 9-29 [abbr. Bier/Allinder, Holocaust].

Blatter, Joachim K.: *'Legitimacy',* in: Bevir, Mark (ed.): Encyclopedia of Governance, Vol. II, London et al.: Sage Publications 2007, pp. 518-521 [abbr. Blatter, Legitimacy].

Bock, Petra: Vergangenheitspolitik im Systemwechsel. Die Politik der Aufklärung, Strafverfolgung, Disqualifizierung und Wiedergutmachung im letzten Jahr der DDR, Berlin: Logos 2000 [abbr. Bock, Systemwechsel].

Boers, Klaus / Nelles, Ursula / Theile, Hans (eds.): Wirtschaftskriminalität und die Privatisierung der DDR-Betriebe, Baden-Baden: Nomos 2010 [abbr. Boers et al., Privatisierung].

Bohrmann, Hans: *'The Amalgamation of East German and West German Media, 1989-1995'*, in: Daly, Peter M. et al. (eds.): Germany Reunified. A Five- and Fifty-Year Retrospective, New York et al: Peter Lang 1997, pp. 21-28 [abbr. Bohrmann, Amalgamation].

Böick, Marcus: Die Treuhand. Idee – Praxis – Erfahrung, 1990-1994, Göttingen: Wallstein 2018 [abbr. Böick, Treuhand].

Böick, Marcus/Goschler, Constantin: Wahrnehmung und Bewertung der Arbeit der Treuhandanstalt (= Studie im Auftrag des Bundesministeriums für Wirtschaft und Energie), 2017, <https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/wahrnehmung-bewertung-der-arbeit-der-treuhandanstalt-lang.pdf?__blob=publicationFile&v=24>, last access: 14 August 2019 [abbr. Böick/Goschler, Wahrnehmung].

Böick, Marcus: Die Treuhandanstalt 1990-1994, Erfurt: Landeszentrale für politische Bildung Thüringen 2015 [abbr. Böick, Treuhand].

Bouvier, Beatrix: Die DDR – ein Sozialstaat? Sozialpolitik in der Ära Honecker. Bonn: Dietz 2002 [abbr. Bouvier, Sozialstaat].

Braunthal, Gerald: The German Social Democrats since 1969. A Party in Power and Opposition. Boulder et al.: Westview Press 1994 [abbr. Braunthal,

Social Democrats].

Brems, Eva: 'Transitional Justice in the Case Law of the European Court of Human Rights', in: The International Journal of Transitional Justice 5 (2011), pp. 282-303 [Brems, TJ].

Brokoff, Jürgen: *Übergänge. Literarisch-juridische Interferenzen bei Peter Handke und die Medialität von Rechtsprechung und Tribunal*, in: Gephart, Werner et al. (eds.): Tribunale. Literarische Darstellung und juridische Aufarbeitung von Kriegsverbrechen im globalen Kontext (=Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 4), Frankfurt a.M.: Vittorio Klostermann 2014, pp. 157-172 [abbr. Brokoff, Übergänge].

Broszat, Martin: „Holocaust" und die Geschichtswissenschaft, in: VfZ 27 (1979), S. 285– 298 [abbr. Broszat, Holocaust].

Buchner, Silke: Die Rechtswidrigkeit der Taten von ‚Mauerschützen' im Lichte von Art. 103 II GG unter besonderer Berücksichtigung des Völkerrechts. Ein Beitrag zum Problem der Verfolgung von staatlich legitimiertem Unrecht nach Beseitigung des Unrechtssystems, Frankfurt a.M.: Peter Lang 1996 [abbr. Buchner, Rechtswidrigkeit].

Bundschuh, Thomas: *'Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity'*, in: International Journal of Transitional Justice 9 (2015), pp. 10-32 [abbr. Bundschuh, TJ].

Buruma, Ian: The Wages of Guilt: Memories of War in Germany and Japan, New York: Farrar, Straus and Giroux 1994 [abbr. Buruma, Wages].

Calabretta, Costanza: *'Feiern und Gedenken: Zur Entwicklung einer gemeinsamen Erinnerungskultur seit dem 3. Oktober 1990'*, in: Aus Politik und Zeitgeschichte (2015), B 33-34, pp. 3-10 [abbr. Calabretta, Feiern].

Connerton, Paul: *'Seven Types of Forgetting',* in: Memory Stuides 1 (2008), pp. 59-71 [abbr. Connerton, Forgetting].

Considine, Mark / Afzal, Kamran Ali: *Legitimacy',* in: Bevir, Mark (ed.): The SAGE Handbook of Governance, London et al.: Sage 2011, pp. 369-385 [abbr. Considine/Afzal, Legitimacy].

Conze, Eckhart: Die Suche nach Sicherheit. Eine Geschichte der Bundesrepublik Deutschland von 1949 bis in die Gegenwart. München: Siedler 2009 [abbr. Conze, Sicherheit].

Dahn, Daniela: Wir bleiben hier oder wem gehört der Osten. Vom Kampf um Häuser und Wohnungen in den neuen Bundesländern. Reinbek bei Hamburg: Rowohlt 2003 [abbr. Dahn, Osten].

Doering-Manteuffel, Anselm/Raphael, Lutz/Schlemmer, Thomas (eds.): Vorgeschichte der Gegenwart. Dimensionen des Strukturbruchs nach dem Boom, Göttingen: Vandenhoeck & Ruprecht 2016 [abbr. Doering-

Manteuffel/Raphael, Vorgeschichte].

Doering-Manteuffel, Anselm/Raphael, Lutz: Nach dem Boom. Perspektiven auf die Zeitgeschichte seit 1970, Göttingen: Vandenhoeck & Ruprecht 2008 [abbr. Doering-Manteuffel/Raphael, Boom].

Duranti, Marco: *'Conservatives and the European Convention on Human Rights',* in: Frei, Norbert / Weinke, Annette (eds.): Toward a new moral order? Menschenrechtspolitik und Völkerrecht seit 1945, Göttingen: Wallstein 2013, pp. 82-93 [abbr. Duranti, Conservatives].

Eastmond, Marita/Selimovic, Johanna Mannergren: *'Silence as Possibility in Postwar Everyday Life',* in: The International Journal of Transitional Justice 6 (2012), pp. 502-524 [Eastmond/Selimovic, Silence].

Easton, David: A systems Analysis of Political Life, New York ^{3}1979 [abbr. Easton, Analysis].

Ebert, Philipp: The Impact of the TV-series *Holocaust* on West German Memory Culture, 1978-83, *M.Phil dissertation, University of Cambridge, 2015* [Ebert, Impact].

Elbe, Frank/Kiessler, Richard: A Round Table with Sharp Corners. The diplomatic Path to German Unity, Baden-Baden: Nomos 1996 [abbr. Elbe/Kiessler, Path].

Eley, Geoff / Palmowski, Jan (eds.): Citizenship and National Identity in Twentieth-Century Germany, Stanford: Stanford University Press 2008

Elster, Jon: Closing the books. Transitional Justice in historical perspective, Cambridge: Cambridge University Press 2004 [abbr. Elster, Closing]

Ely, John H.: Democracy and Distrust. A Theory of Judicial Review, Cambridge (MA): Harvard University Press ^{2}1992.

Erdmann, Yvonne: 'The Outcome of German Reunification for The West Germans. Three different views', in: Daly, Peter M. et al. (eds.): Germany Reunified. A Five- and Fifty-Year Retrospective, New York et al: Peter Lang 1997, pp. 175-188 [abbr. Erdmann, Outcome].

Fahnenschmidt, Willi: DDR-Funktionäre vor Gericht. Die Strafverfahren wegen Amtsmißbrauch und Korruption im letzten Jahr der DDR und nach der Vereinigung (= Berliner Juristische Universitätsschriften, Bd. 5), Berlin: Verlag A. Spitz / Baden-Baden: Nomos 2000 [abbr. Fahnenschmidt, Funktionäre].

Fink, Carole/Schaefer, Bernd (eds.): Ostpolitik, 1969-1974. European and Global Responses, Cambridge, Cambridge University Press 2009 [abbr. Fink/Schaefer, Ostpolitik].

Fischer, Frank: "Im deutschen Interesse". Die Ostpolitik der SPD von 1969 bis

1989, Husum, Matthiassen 2001 [abbr. Fischer, Ostpolitik].

Frei, Norbert: 1945 und wir. Das Dritte Reich im Bewusstsein der Deutschen, München: Beck 2009 [abbr. Frei, 1945].

Frei, Norbert: Adenauer's Germany and the Nazi Past. The Politics of Amnesty and Integration, New York: Columbia University Press 2002, (first published in 1996) [abbr. Frei, Nazi Past].

Frowein, Jochen Abr.: *'European Convention on Human Rights (1950)'* in: Bernhardt, Rudolf (ed.): Encyclopedia of Public International Law, Vol. II, Amsterdam et al.: Elsevier 1995, pp.188-96 [abbr. Frowein, ECHR].

Fuchs, Dieter et al: *'Support of the Democratic System'*, in: Klingemann, Hans-Dieter / Fuchs, Dieter (eds.): Citizen and the State. Beliefs in Government, Vol. 1, Oxford 1995, pp. 323-353 [abbr. Fuchs, Support].

Fulbrook, Mary: German National Identity after the Holocaust, Cambridge: Polity Press 1999 [Fulbrook, Identity].

Gabriel, Manfred J.: *'Coming to Terms with the East German Border Guards Cases'*, in: Columbia Journal of Transnational Law, 38 (1999), pp. 375-418 [Gabriel, Coming to Terms].

Gabriel, Oscar: *'Politische Unterstützung'*, in: Greiffenhagen, Martin/Greiffenhagen, Sylvia (eds.): Handwörterbuch zur politischen Kultur der Bundesrepublik Deutschland, Wiesbaden: Westdeutscher Verlag ²2002, pp. 477-483 [abbr. Gabriel, Politische Unterstützung].

Gabriel, Oscar W.: *'Demokratische Einstellungen in einem Land ohne demokratische Traditionen? Die Unterstützung der Demokratie in den neuen Bundesländern im Ost-West-Vergleich',* in: Falter, Jürgen/Gabriel, Oscar W./Rattinger, Hans (eds.): Wirklich ein Volk? Die politischen Orientierungen von Ost- und Westdeutschen im Vergleich, Opladen: Leske + Budrich 2000, pp. 41-78 [abbr. Gabriel, Einstellungen].

Gebhardt, Miriam: Als die Soldaten kamen. Die Vergewaltigung deutscher Frauen am Ende des Zweiten Weltkrieges, München: DVA 2015 [abbr. Gebhardt, Vergewaltigung].

Gehrig, Sebastian: '*Cold War Identities: Citizenship, Constitutional Reform, and International Law between East and West Germany, 1967-75',* in: Journal of Contemporary History 49 (2014), No. 4, pp. 794-814 [abbr. Gehrig, Identitites].

Geiger, Rudolf: *'The German Border Guard Cases and International Human Rights'*, in: European Journal of International Law, 9 (1998), pp. 540-49 [Geiger, Cases].

Gephart, Werner / Sakrani, Raja: Preface – Reading Legal Cultures in Transition, in: Gephart, Werner, Sakrani, Raja / Hellmann, Jenny (eds.): Rechtskulturen

im Übergang – Legal Cultures in Transition. Von Südafrika bis Spanien, von Nachkriegsdeutschland bis zum Aufbruch der arabischen Welt (= Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 10), Frankfurt a.M.: Vittorio Klostermann 2015, pp. 7-12 [abbr. Gephart/Sakrani, Legal Cultures].

Gephart, Werner: Constitution as Culture. Constitutional Universalism and Pluralism of Legal Culture (= Working Paper of the Käte Hamburger Kolleg 'Recht als Kultur'), 2016, online accessible at: < http://www.recht-als-kultur.de/de/download/66/364/1819/Werner%20Gephart%20WP%20Constitutions%20as%20Culture.pdf>, last access: 1 August 2019 [abbr. Gephart, Culture].

Goldbeck, Marcus: 'Vergangenheit als politische Ressource. Das Beispiel der Stasi-Unterlagen-Behörde (BStU) im Kontext der "Stasi-Debatte"', in: Großbölting, Thomas/Lorke, Christoph (eds.): Deutschland seit 1990. Wege in die Vereinigungsgesellschaft, Stuttgart: Franz Steiner 2017, pp. 213-224 [abbr. Goldbeck, Vergangenheit].

Goschler, Constantin: Wiedergutmachung. Westdeutschland und die Verfolgten des Nationalsozialismus, 1945-1954, München: Oldenbourg 1992 [abbr. Goschler, Wiedergutmachung].

Grasemann, Hans-Jürgen: Reanimation eines Fossils. Der Beitrag der Zentralen Erfassungsstelle Salzgitter zur justitiellen Aufarbeitung des SED-Unrechts, in: Stephan, Annegret (ed.): 1945 bis 2000. Ansichten zur deutschen Geschichte – Zehn Jahre Gedenkstätte Moritzplatz Magdeburg für die Opfer politischer Gewaltherrschaft 1945 bis 1989, Opladen: Leske & Budrich 2002, pp. 55-68 [abbr. Grasemann, ZESt].

Griffins, Courtney Glore: *'Reinterpreting the Soviet War Memorial in Berlin's Treptower Park after 1990'*, in: Clarke, David / Wölfe, Ute (eds.): Remembering the German Democratic Republic. Divided Memory in a United Germany, Houndsmills: Palgrave Macmillan 2011, pp. 54-64 [abbr. Griffins, Memorial].

Grimm, Dieter: Recht und Staat der bürgerlichen Gesellschaft, Frankfurt: Suhrkamp 1987 [abbr. Grimm, Recht und Staat]

Groh, Dieter/Brandt, Peter: "Vaterlandslose Gesellen". Sozialdemokratie und Nation 1860-1990, München, C.H. Beck 1992.

Grunwald, Henning: Courtroom to Revolutionary Stage. Performance and Ideology in Weimar political trials, Oxford: OUP 2012 [abbr. Grunwald, Courtroom].

Habermas, Rebekka: Diebe vor Gericht. Die Entstehung der modernen Rechtsordnung im 19. Jahrhundert, Frankfurt a.M. / New York: Campus 2008 [abbr. Habermas, Diebe].

Hacke, Christian: Weltmacht wider Willen. Die Außenpolitik der Bundesrepublik Deutschland, Frankfurt am Main/Berlin: Ullstein 1993 [abbr. Hacke, Weltmacht].

Hacker, Jens: '*Die Haltung von CDU, CSU, FDP und Grünen zur deutschen Frage',* in: Eisenmann, Peter/Harscher, Gerhard (eds.): Dem Zeitgeist geopfert. Die DDR in Wissenschaft, Publizistik und politischer Bildung, München: v. Hase & Koehler 1992, pp. 115-140 [abbr. Hacker, Haltung].

Hacker, Jens: *'Die deutsche Frage aus der Sicht der SPD'*, in: Blumenwitz, Dieter/Zieger, Gottfried (eds.): Die deutsche Frage im Spiegel der Parteien, Köln: Verlag Wissenschaft und Politik 1989, pp**.** 39-66 [abbr. Hacker, Frage].

Haunhorst, Regina/Lepper-Binnewerg, Antoinette/Zündorf, Irmgard: Biografie Rainer Eppelmann, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/rainer-eppelmann.html>, last access:10 July 2019 [Haunhorst et al., Eppelmann].

Haunhorst, Regina/Zündorf, Irmgard: Biografie Erich Mielke, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/erich-mielke.html>; last access: 03 July 2019.

Haunhorst, Regina/Zündorf, Irmgard: Biografie Erich Honecker, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/erich-honecker.html>, last access: 03 July 2019.

Henry, Nicola: *'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies',* in: International Journal of Transitional Justice 9 (2015), pp. 199-218 [abbr. Henry, Reconiliation].

Herrmann, Anne-Kathrin: Karl Jaspers: ‚Die Schuldfrage', in: Fischer, Torben / Lorenz, Matthias N. (eds.): Lexikon der ‚Vergangenheitsbewältigung' in Deutschland. Debatten- und Diskursgeschichte des Nationalsozialismus in Deutschland nach 1945, Bielefeld: transcript 2007, pp. 45-46 [abbr. Herrmann, Jaspers].

Hodgin, Nick / Pearce, Caroline (eds.): The GDR remembered. Representations of the East German State since 1989, Rochester: Camden House 2011 [abbr. Hodgin/Pearce, GDR].

Horne, Cynthia M.: *'The Impact of Lustration on Democratization in Postcommunist Countries',* in: The International Journal of Transitional Justice 8 (2014), pp. 496-521 [abbr. Horne, Impact].

Hyland, Claire: *' "Ostalgie doesn't fit!" Individual Interpretations of and Interaction with Ostalgie',* in: Anne Saunders / Debbie Pinfold (eds.):

Rembembering and Retinking the GDR. Multiple Perspectives and Plural Authenticities, Houndsmills: Palgrave Macmillan 2013, pp. 101-115 [abbr. Hyland, Ostalgie].

Jakiša, Miranda: *Postdramatischer Bühnen-Tribunal: Gerichtstheater rund um das ICTY*, in: Gephart, Werner et al. (eds.): Tribunale. Literarische Darstellung und juridische Aufarbeitung von Kriegsverbrechen im globalen Kontext (=Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 4), Frankfurt a.M.: Vittorio Klostermann 2014, pp. 223-242 [abbr. Jakiša, Tribunal].

Jones, Sara: The Media of Testimony. Remembering the East German Stasi in the Berlin Republic, Houndmills: Palgrave Macmillan 2014 [abbr. Jones, Media].

Jordan, Jennifer A.: *'Apples, Identity and Memory in Post-1989 Germany'*, in: Fuchs, Anne/James-Chakraborty, Kathleen/Shortt, Linda (eds.): Debating German Cultural Identity since 1989, Rochester: Camden House 2011, pp. 46-64 [abbr. Jordan, Apples].

Kaase, Max: *'Transition/Transformation',* in: Greiffenhagen, Martin/Greiffenhagen, Sylvia (eds.): Handwörterbuch zur politischen Kultur der Bundesrepublik Deutschland, Wiesbaden: Westdeutscher Verlag ²2002, pp. 600-610 [abbr. Kaase, Transition].

Kansteiner, Wulff: In pursuit of German Memory. History, television, and politics after Auschwitz*,* Athens: Ohio University Press 2006 [abbr. Kansteiner, Memory].

Karahasan, Dževad: *Tribunal, Theater und das Drama des Rechts*, in: Gephart, Werner et al. (eds.): Tribunale. Literarische Darstellung und juridische Aufarbeitung von Kriegsverbrechen im globalen Kontext (=Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 4), Frankfurt a.M.: Vittorio Klostermann 2014, pp. 151-156 [abbr. Karahasan, Tribunal].

Karstedt, Susanne: *Die doppelte Vergangenheitsbewältigung der Deutschen: Die Verfahren im Urteil der Öffentlichkeit nach 1945 und 1989,* in: Zeitschrift für Rechtssoziologie 17 (1996), No. 1, 58-104 [abbr. Karstedt, Vergangenheitsbewältigung].

Keller, Iris: Die strafrechtliche Aufarbeitung von DDR-Justizunrecht, Frankfurt a.M.: Internationaler Verlag der Wissenschaften 2013 [abbr. Keller, Aufarbeitung].

Kempe, Frederick: Berlin 1961. Kennedy, Khrushchev, and the Most Dangerous Place on Earth, New York: G.P. Putnam's Sons 2011 [abbr. Kempe, Berlin].

Kielmansegg, Peter Graf: Die Grammatik der Freiheit. Acht Versuche über den demokratischen Verfassungsstaat (= Schriftenreihe der Bundeszentrale für politische Bildung, vol. 1376), Bonn: Bundeszentrale für politische Bildung

2013 [abbr. Kielmansegg, Freiheit].

Kirchhof, Ferdinand: *'Bundesverfassungsgericht',* in: Staatslexikon der Görres-Gesellschaft, Vol. 1, 8th edition, Freiburg: Herder 2017, 889-893 [abbr. Kirchhof, Bundesverfassungsgericht].

Klein, Thomas: 'Entwicklungsstationen der neuen politischen Vereinigungen in der DDR im Herbst/Winter 1989/90', in: Stephan, Gerd-Rüdiger et al. (eds.): Die Parteien und Organisationen der DDR. Ein Handbuch, Berlin: Karl Dietz 2002, pp. 847-63 [abbr. Klein, Vereinigungen].

Klinge, Sebastian: 1989 und wir. Geschichtspolitik und Erinnerungskultur nach dem Mauerfall, Bielefeld: transcript 2015 [abbr. Klinge, 1989].

Kowalczuk, Ilko-Sascha: Die Übernahme. Wie Ostdeutschland Teil der Bundesrepublik wurde, München: C.H. Beck 2019 [abbr. Kowalczuk, Übernahme].

Lang, Sabine: *'Unifying a Gendered State. Women in Post-1989 Germany'*, in: Taberner, Stuart / Finlay, Frank (eds.): Recasting German Identity. Culture, Politics and Literature in the Berlin Republic, Rochester: Camden House 2002, pp. 157-170 [abbr. Lang, Unifying].

Lee, Mia: *'GDR Monuments in Unified Germany'*, in Niven, Bill / Paver, Chloe (eds.):Memorialization in Germancy since 1945, Houndmills / New York: Palgrave Macmillan 2010, pp. 308-17 [abbr. Lee, Monuments].

Lemmons, Russel: *' "Imprisoned, Murdered, Besmirched": The Controversy Concerning Berlin's Ernst Thälmann Monument and German National Identity, 1990-1995'*, in: Arnold-de Simone, Silke (eds.): Memory Traces. 1989 and the Question of German Cultural Identity, Oxford et al.: Peter Lang 2005, pp. 309-34 [abbr. Lemmons, Controversy].

Leo, Annette: Antifaschismus, in: Martin Sabrow (ed.): Erinnerungsorte der DDR, München: Beck 2009, 30-42 [abbr. Leo, Antifaschismus].

Levi, Ron / Dezalay, Sara / Michael Amiraslani: *Prosecutional Strategies and Opening Statements: Justifying International Prosecutions from the International Military Tribunal at Nuremberg through to the International Criminal Court,* in: comparativ. Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 26 (2016), no. 4, pp. 58-73 [abbr. Levi/Dezalay/Amiraslani, Prosecutional Strategies].

Lipstadt, Deborah E.: The Eichmann Trial, New York: Nextbook/Schocken 2011 [abbr. Lipstadt, Eichmann Trial].

Macdonald, Ronald St. J.: *'The Margin of Appreciation'*, in: Macdonald, Ronald St. J./Matscher, Franz/Petzold, Herbert (eds.): The European System for the Protection of Human Rights, Dordrecht/Boston/London: Martinus Nijhoff Publishers, pp. 83-124 [abbr. Macdonal, Margin].

Markovits, Inga: Gerechtigkeit in Lüritz. Eine ostdeutsche Rechtsgeschichte, München: C.H. Beck 2006 [abbr. Markovits, Lüritz].

Markovits, Inga: '*Selective Memory. How the law affects what we remember and forget about the past – the case of East Germany'*, in: Law and Society Review 35 (2001), 513-563 [abbr. Markovits, Memory].

Marxen, Klaus / Werle, Gerhard / Schäfter, Petra, Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen, Berlin 2007 [Marxen/Werle/Schäfter, Strafverfolgung].

Marxen, Klaus / Werle, Gerhard: Die strafrechtliche Aufarbeitung von DDR-Unrecht. Eine Bilanz, Berlin / New York: de Gruyter 1999 [abbr. Marxen/Werle, Aufarbeitung].

Marxen, Klaus / Werle, Gerhard (eds.): Strafjustiz und DDR-Unrecht. Dokumentation in sieben Bänden, Berlin/Boston: De Gruyter 2000–2009 [abbr. Marxen/Werle, Strafjustiz]

Vol. 1: Wahlfälschung, Berlin/Boston: De Gruyter 2000.

Vol. 2: Gewalttaten an der deutsch-deutschen Grenze (2 sub-volumes), 2002.

Vol. 3: Amtsmißbrauch und Korruption, 2002.

Vol. 4: Spionage (2 sub-volumes), 2004.

Vol. 5: Rechtsbeugung (2 sub-volumes), 2008.

Vol. 6: MfS-Straftaten, 2006.

Vol. 7: Gefangenenmißhandlung, Doping und sonstiges DDR-Unrecht, 2018.

McAdams, A. James: Judging the Past in Unified Germany, Cambridge et al: Cambridge University Press 2001 [abbr. McAdams, Judging the Past].

Meier, Christian: Vom Gebot zu Vergessen und der Unabweisbarkeit des Erinnerns. Vom öffentlichen Umgang mit schlimmer Vergangenheit, Siedler: München 2010 [abbr. Meier, Gebot]

Mihr, Anja / Pickel, Gert / Pickel, Susanne: 'Einführung in Transitional Justice', in: Mihr, Anja / Pickel, Gert / Pickel, Susanne (eds.): 'Handbuch Transitional Justice. Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie, Wiesbaden, Springer 2019, pp. 3-23 [abbr. Mihr/Pickel/Pickel, Transitional Justice].

Mihr, Anja: Transitional Justice and the Quality of Democracy, in : International Journal of Conflict and Violence 7 (2013), no. 2, pp. 299-313 [Mihr, TJ].

Mock, Erhard: *'Rechtssicherheit',* in: Staatslexikon der Görres-Gesellschaft, Vol. 4, 7th edition, Freiburg: Herder 1988, 731-733 [abbr. Mock,

Rechtssicherheit].

Mouralis, Guillaume: Une épuration allemande. La RDA en procès, 1949-2004, Paris: Fayard 2008 [abbr. Mouralis, épuration].

Mowbray, Alastair: Cases, Materials, and Commentary on the European Convention on Human Rights, Oxford et al.: Oxford University Press [3]2012 [abbr. Mowbray, ECHR].

Müller, Jan-Werner: *'East Germany. Incorporation, Tainted Truth, and the Double Division'*, in: Barahona de Brito, Alexandra / Gonzalez Enriquez, Carmen / Aguilar, Paloma (eds.): The politics of memory and democratization, Oxford et al.: Oxford University Press 2003, pp. 248-74 [abbr. Müller, East Germany].

Niven, Bill: Reactive Memory. The Holocaust and the Flight and Expulsion of Germans, in: Marc Silberstein and Florence Vatan (eds.): Memory and Postwar Memorials. Confronting the Violence of the Past, Houndmills / New York: Palgrave Macmillan 2013, 51-70 [abbr. Niven, Memory].

Niven, Bill: Facing the Nazi Past: United Germany and the Legacy of the Third Reich, London: Routledge 2001 [abbr. Niven, Facing].

Noelle-Neumann, Elisabeth: 'Rechtsbewußtsein im wiedervereinigten Deutschland', in: Zeitschrift für Rechtssoziologie 16 (1995), No. 2, pp. 121-155 [abbr. Noelle-Neumann, Rechtsbewußtsein].

Nohlen, Dieter: '*Legitimität'*, in: Nohlen, Dieter / Schultze, Rainer-Olaf (eds.): Lexikon der Politikwissenschaft, vol. 1 A-M, München: C.H. Beck [4]2010, pp. 544-546 [abbr. Nohlen, Legitimität].

Oexle, Otto Gerhard: *Rechtsgeschichte und Geschichtswissenschaft,* in: Simon, Dieter (ed.): Akten des 26. Deutschen Rechtshistorikertages (Frankfurt am Main, 22–26 September 1986), Frankfurt a.M.: Vittorio Klostermann 1987, pp. 77-107 [abbr. Oexle, Rechtsgeschichte].

Orlow, Dietrich: The GDR's Failed Search for a National Identity, 1945-1989, in: German Studies Review, 29 (2006) 3, 547–558 [Orlow, Identity].

Palmowski, Jan: Inventing a Socialist Nation. Heimat and the Politics of Everyday Life in the GDR, 1945-1990, Cambridge: Cambridge University Press, 2009 [abbr. Palmowski, Inventing].

Parr, Rolf: *'National Symbols and the German Reunification'*, in: Arnold-de Simone, Silke (eds.): Memory Traces. 1989 and the Question of German Cultural Identity, Oxford et al.: Peter Lang 2005, pp. 27-54 [abbr. Parr, Symbols].

Pence, Katherine / Betts, Paul (eds.): Socialist Modern? East German Everyday Culture and Politics, Ann Arbor: University of Michigan Press 2008 [abbr. Pence/Betts, Culture and Politics].

Pendas, Devin O.: The Frankfurt Auschwitz Trial, 1963-65. Genocide, history, and the limits of the law, Cambridge: Cambridge University Press 2006 [abbr. Pendas, Trial].

Pötzl, Norbert F.: Der Treuhand-Komplex. Legenden, Fakten, Emotionen, Hamburg: Kursbuch.Edition 2019 [abbr. Pötzl, Treuhand].

Priemel, Kim Christian: The Betrayal. The Nuremberg trials and German divergence, Oxford et al: Oxford University Press 2016 [abbr. Priemel, Betrayal].

Priemel, Kim C. / Stiller, Alexa (eds.): Reassessing the Nuremberg Military Tribunals. Transitional Justice, Trial Narratives, and Historiography, New York / Oxford: Berghan Books 2012 [abbr. Priemel/Stiller, Tribunals].

Pruybylski, Peter: Tatort Politbüro: die Akte Honecker, Reinbek bei Hamburg: Rowohlt 1991/1992 [abbr. Prubybylski, Tatort].

Quint, Peter E.: *'Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command'*, in: The Review of Politics, 61 (1999), no. 2, pp. 303-29 [abbr. Quint, Judging].

Reichel, Peter: Vergangenheitsbewältigung in Deutschland, München 2001 [abbr. Reichel, Vergangenheitsbewältigung].

Reichel, Peter: Politik mit der Erinnerung. Gedächtnisorte im Streit um die nationalsozialistische Vergangenheit, München/Wien, 1995 [abbr. Reichel, Politik].

Rödder, Andreas: Deutschland einig Vaterland. Die Geschichte der Wiedervereinigung, München: C.H.Beck 2009 [Rödder, Deutschland].

Roht-Arriaza, Naomi: *'The new landscape of transitional justice'*, in: Roht-Arriaza, Naomi / Mariezcurrena, Javier (eds.): Transitional Justice in the Twenty-First Century, Cambridge et al.: Cambridge University Press 2006, pp. 1-17 [abbr. Roth-Arriaza, Landscape].

Rudnick, Carola S.: Die andere Hälfte der Erinnerung. Die DDR in der deutschen Geschichtspolitik nach 1989, Bielefeld: Transcript 2011 [abbr. Rudnick, Erinnerung].

Rummler, Toralf: Die Gewalttaten an der Deutsch-Deutschen Grenze vor Gericht, Berlin / Baden-Baden: Berlin Verlag / Nomos 2000 [abbr. Rummler, Gewalttaten].

Russo, Henry: '*History of Memory, Policies of the Past: What For?',* in: Jarausch, Konrad/Lindenberger, Thomas (eds.): Conflicted Memories. Europeanizing Contemporary Histories, Oxford/New York: Berghahn 2007, 23-37 [abbr. Russo, History of Memory].

Sälter, Gerhard: *'Der Rechtsstaat und das Grenzregime der DDR. Die*

strafrechtliche Verfolgung der Grenzdelikte in der Bundesrepublik', in: Ganzenmüller, Jörg (ed.): Recht und Gerechtigkeit. Die strafrechtliche Aufarbeitung von Diktaturen in Europa, Köln/Weimar/Wien: Böhlau 2017, pp. 115-130 [abbr. Sälter, Rechtsstaat].

Sälter, Gerhard / Dietrich, Johanna / Kuhn, Fabian: Die vergessenen Toten. Todesopfer des DDR-Grenzregimes in Berlin von der Teilung bis zum Mauerbau (1948-1961), Berlin: Ch. Links 2016 [abbr. Sälter/Dietrich/Kuhn, Todesopfer].

Saunders, Anna : '*The Politics of Memory in Berlin's Freiheits- und Einheitsdenkmal',* in: Saunders, Anne / Pinfold, Debbie (eds.): Rembembering and Retinking the GDR. Multiple Perspectives and Plural Authenticities, Houndsmills: Palgrave Macmillan 2013, pp. 164-178 [abbr. Saunders, Politics].

Schlink, Bernhard: Vergangenheitsschuld. Beiträge zu einem deutschen Thema, Zürich: Diogenes 2007 [abbr. Schlink, Vergangenheitsschuld].

Schlink, Bernhard: *'Rechtsstaat und revolutionäre Gerechtigkeit',* in: Neue Justiz 48 (1994), no. 10, no pages indicated.

Schröter, Anja: Ostdeutsche Ehen vor Gericht. Scheidungspraxis im Umbruch 1980-2000, Berlin: Ch. Links 2018 [abbr. Schröter, Ehen].

Segesser, Daniel Marc: Recht statt Rache oder Rache durch Recht? : die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872–1945, Paderborn et al.: Schöningh 2010 [abbr. Segesser, Recht statt Rache].

Siemens, Daniel: *Towards a New Cultural History of Law,* in: InterDisciplines 3 (2012), No. 2, pp. 18-45. [abbr. Siemens, Cultural History].

Simon, Vera Caroline: *'Tag der Deutschen Einheit: Festakt und Live-Übertragung im Wandel'*, in: Aus Politik und Zeitgeschichte 2015, B 33-34, pp. 11-17 [abbr. Simon, Tag].

Sintrup, Jan Christoph: Umkämpftes Recht. Zur mehrdimensionalen Analyse rechtskultureller Konflikte durch die politische Kulturforschung (= Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 22), Frankfurt a.M.: Vittorio Klostermann 2018 [Sintrup, Recht].

Sintrup, Jan Christoph: Einleitung – Über die rechtliche, kulturelle und literarische Bedeutung von Tribunalen, in: Gephart, Werner et al. (eds.): Tribunale. Literarische Darstellung und juridische Aufarbeitung von Kriegsverbrechen im globalen Kontext (=Schriftenreihe des Käte Hamburger Kollegs 'Recht als Kultur', vol. 4), Frankfurt a.M.: Vittorio Klostermann 2014, pp. 9-26 [abbr. Sintrup, Bedeutung].

Staab, Andreas: National Identity in Eastern Germany. Inner Unification or

Continued Separation?, Westport / London: Praeger 1998 [Staab, Identity].

Steinberg, Ronen: *'Transitional Justice in the Age of the French Revolution',* in: The International Journal of Transitional Justice 7 (2013), pp. 267-285 [abbr. Steinberg, Revolution].

Stern, Fritz, The Many Unifications of Germany, in: Bulletin of the American Academy of Arts and Sciences, 48 (1995), no. 5, pp. 28-42 [abbr. Stern, Unifications].

Stolleis, Michael: Verfassungs(ge)schichten (= fundamenta Juris Publici, vol. 6), Tübingen: Mohr Siebeck 2017 [abbr. Stolleis, Verfassungs(ge)schichten].

Suchman, Mark C.: '*Managing Legitimacy: Strategic and Institutional Approaches',* in: The Academy of Management Review 20 (1995), no. 3, pp. 571-610 [abbr. Suchman, Legitimacy].

Suckut, Siegfried (ed.): Volks Stimmen. 'Ehrlich, aber deutlich ' – Privatbriefe an die DDR-Regierung, München: C.H. Beck 2016 [abbr. Suckut, Volkes Stimmen].

Scholtyseck, Joachim: Conservative Intellectuals and the Debate over National Socialism and the Holocaust in the 1960s, in: Gassert, Philipp / Steinweis, Alan E. (eds.): Coping with the Nazi Past. West German Debates on Nazism and Generational Conflict, 1955-1975, New York / Oxford: Berghahn Books 2006, pp. 238-57 [Scholtyseck, Intellectuals].

Staats, Johann-Friederich: ' „Lustration" – oder die Überprüfung der Richter und Staatsanwälte aus der DDR', in: Bästlein, Klaus (ed.): Die Einheit. Juristische Hintergründe und Probleme. Deutschland im Jahr 1990, Schriftenreihe des Berliner Landesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR, Berlin 2011, pp. 85-103 [abbr. Staats, Lustration].

Süß, Dietmar: Tod aus der Luft. Kriegsgesellschaft und Luftkrieg in Deutschland und England, München: Siedler 2011 [abbr. Süß, Tod].

Thompson, Peter: *'The PDS. "CSU des Ostens?" – Heimat and the Left'*, in: Taberner, Stuart / Finlay, Frank (eds.): Recasting German Identity. Culture, Politics and Literature in the Berlin Republic, Rochester: Camden House 2002, pp. 123-140 [abbr. Thompson, PDS].

Tomlins, Christopher: *'Subordination, Authority, Law: Subjects in Labor History',* in: International Labor and Working-Class History *47 (1995)*, pp. 56-90 [abbr. Tomlins, Subordination].

Tomuschat, Christian: *'International Covenant on Civil and Political Rights, Human Rights Committee',* in: : Bernhardt, Rudolf (ed.): Encyclopedia of Public International Law, Vol. II, Amsterdam et al.: Elsevier 1995, pp.1115-19 [abbr. Tomuschat, ICCPR].

Umansky, Andrej: "Geschichtsschreiber wider Willen? Einblick in die Quellen der „Außerordentlichen Staatlichen Kommission“ und der „Zentralen Stelle“", in: Nußberger, Angelika / Gall, Caroline von (eds.): Bewusstes Erinnern und bewusstes Vergessen. Der juristische Umgang mit der Vergangenheit in den Ländern Mittel- und Osteuropas, Tübingen 2011, 347-374 [abbr. Umansky, Geschichtsschreiber].

Unverhau, Dagmar (ed.): Lustration, Aktenöffnung, demokratischer Umbruch in Polen, Tschechien, der Slowakei und Ungarn (= Archiv zur DDR-Staatssicherheit, vol. 3), Münster: Lit 1999 [abbr. Unverhau, Aktenöffnung].

Strätz, Hans-Wolfgang: *'Verjährung',* in: Staatslexikon der Görres-Gesellschaft, Vol. 5, 7th edition, Freiburg/Basel/Wien: Herder 1989, 671-74 [abbr. Strätz, Verjährung].

Volk, Rainer: Das letzte Urteil. Die Medien und der Demjanjuk-Prozess, München: Oldenbourg 2012 [abbr. Volk, Urteil].

Vollnhals, Clemens: Die strafrechtliche Ahndung der Gewalttaten an der innerdeutschen Grenze, in: Henke, Klaus-Dietmar (ed.): Die Mauer. Errichtung, Überwindung, Erinnerung, München: dtv 2011, pp. 241-251 [Vollnhals, Ahndung].

Vollnhals, Clemens: *'Der Totalitarismusbegriff im Wandel',* in: Aus Politik und Zeitgeschichte 2006, B 39, pp. 21-27 [abbr. Vollnhals, Totalitarismusbegriff].

von Lingen, Kerstin: ‘Crimes against Humanity’. Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864-1945, Paderborn: Ferdinand Schöningh 2018 [von Lingen, Crimes].

Vorländer, Hans Herold, Maik/Schäller, Steven: PEGIDA. Entwicklung, Zusammensetzung und Deutung einer Empörungsbewegung, Wiesbaden: Springer VS 2015 [abbr. Vorländer/Schäller, PEGIDA].

Wehler, Hans-Ulrich: ‘*Gesellschaftsgeschichte und Rechtsgeschichte’,* in: Rechtshistorisches Journal 8 (1995), pp. 181-194 [Wehler, Rechtsgeschichte].

Weinert, Rainer/Gilles, Franz-Otto: Der Zusammenbruch des Freien Deutschen Gewerkschaftsbundes (FDGB). Zunehmender Entscheidungsdruck, Institutionalisierte Handlungsschwächung und Zerfall der Hierarchischen Ordnungsstruktur, Opladen/Wiesbaden: Westdeutscher Verlag 1999.

Weinke, Annette: *Die Bundesrepublik Deutschland – ein Fall von Transitional Justice avant la lottre?,* in: Mihr, Anja / Pickel, Gert / Pickel, Susanne (eds.), ‘Handbuch Transitional Justice. Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie, Wiesbaden, Springer 2019, pp. 249-274 [abbr. Weinke, Transitional Justice].

Weinke, Annette: *'West Germany. A Case of Transitional Justice avant la lettre?',* in: Wouters, Nico (ed.): Transitional Justice and Memory in Europe (1945-2013), Cambridge/Antwerp/Portland: Intersentia 2017, pp. 25-61. [abbr. Weinke, West Germany].

Weinke, Annette: Gewalt, Geschichte, Gerechtigkeit. Transnationale Debatten über deutsche Staatsverbrechen im 20. Jahrhundert, Göttingen: Wallstein 2016 [abbr. Weinke, Gewalt].

Weinke, Annette: *Vom „Nie wieder" zur diskursiven Ressource. Menschenrechte als Strukturprinzip internationaler Politik seit 1945*, in: Frei, Norbert / Weinke, Annette (eds.): Toward a New Moral World Order? Menschenrechtspolitik und Völkerrecht seit 1945, Göttingen: Wallstein 2013, pp. 12-39 [abbr. Weinke, Menschenrechte].

Weinke, Annette: Eine Gesellschaft ermittelt gegen sich selbst. Die Geschichte der Zentralen Stelle in Ludwigsburg 1958–2008, Darmstadt: Wissenschaftliche Buchgesellschaft 2008 [abbr. Weinke, Zentrale Stelle].

Weinke, Annette: Die Nürnberger Prozesse, München: Beck 2006 [abbr. Weinke, Nürnberger Prozesse].

Weinke, Annette: Die Verfolgung von NS-Tätern im geteilten Deutschland. Paderborn: Schönigh 2002 [abbr. Weinke, Verfolgung].

Werum, Stefan Paul: *'Freier Deutscher Gewerkschaftsbund (FDGB)',* in: Stephan, Gerd-Rüdiger et al. (eds.): Die Parteien und Organisationen der DDR. Ein Handbuch, Berlin: Karl Dietz 2002, pp. 449-82 [abbr. Werum, FDGB].

Wetzell, Richard F.: Inventing the Criminal: A History of German Criminology, 1880-1945. Chapel Hill: University of North Carolina Press, 2000 [abbr. Wetzell, Inventing].

Wetzell, Richard F.: Crime and Criminal Justice in Modern Germany, New York: Berghahn Books, 2014 [abbr. Wetzell, Crime].

Wienand, Christiane: Returning Memories. Former Prisoners of War in Divided and Reunited Germany, Rochester: Camden House 2015 [abbr. Wienand, Memories].

Wilke, Christiane: '*Östlich des Rechtsstaats. Vergangenheitspolitik, Recht und Identitätsbildung'*, in: Matthäus, Sandra/Kubik, Daniel (eds.): Der Osten. Neue sozialwissenschaftliche Perspektiven auf einen komplexen Gegenstand jenseits von Verurteilung und Verklärung, Wiesbaden, Springer VS 2016, pp.169-194 [abbr. Wilke, Identitätsbildung].

Wingenfeld, Heiko: Die öffentliche Debatte über die Strafverfahren wegen DDR-Unrechts. Vergangenheitsaufarbeitung in der bundesrepublikanischen Öffentlichkeit der 90er Jahre, Berlin: Berliner Wissenschaftsverlag 2006 [abbr. Wingenfeld, Debatte].

Wirsching, Andreas: Abschied vom Provisorium, 1982-1990 (= Geschichte der Bundesrepublik Deutschland, vol. 6), München 2006. [abbr. Wirsching, Abschied].

Wittlinger, Ruth: Taboo or Tradition? The ‚Germans as Victims' Theme in West Germany until the Early 1990s, in: Niven, Bill (ed.): Germans as Victims. Remembering the Past in Contemporary Germany, Houndmills/New York: Palgrave Macmillan 2006, pp. 62-75[abbr. Wittlinger, Taboo].

Wittmann, Rebecca: Beyond Justice. The Auschwitz Trial, Cambridge: Harvard University Press 2005 [abbr. Wittmann, Justice].

Wolfrum, Edgar: Die geglückte Demokratie. Geschichte der Bundesrepublik Deutschland von ihren Anfängen bis zur Gegenwart, München: Pantheon 2007 [abbr. Wolfrum, Demokratie]

Zimmer, Matthias: Nationales Interesse und Staatsräson. Zur Deutschlandpolitik der Regierung Kohl 1982-1989. Paderborn: Ferdinand Schöningh 1992 [abbr. Zimmer, Staatsräson].

Zündorf, Irmgard: Biografie Alexander Schalck-Golodkowski, in: LeMO-Biografien, Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland, <http://www.hdg.de/lemo/biografie/alexander-schalck-golodkowski.html>, last access: 01 July 2019

Internet sources

Bundesagentur für Arbeit (ed): 'Arbeitslose und Arbeitslosenzahlen – Deutschland und West/Ost (Zeitreihe Monats- und Jahreszahlen ab 1950)', <https://statistik.arbeitsagentur.de/nn_31892/SiteGlobals/Forms/Rubrikensuche/Rubrikensuche_Form.html?view=processForm&resourceId=210368&input_=&pageLocale=de&topicId=17722&year_month=aktuell&year_month.GROUP=1&search=Suchen>, last access: 1 July 2019.

Der Bundespräsident: 'Eingaben und Petitionen', <http://www.bundespraesident.de/DE/Amt-und-Aufgaben/Wirken-im-Inland/Eingaben-und-Petitionen/eingaben-und-petitionen-node.html>, last access: 14 May 2019.

Der Bundespräsident: 'Bundespräsident Joachim Gauck anlässlich des 70. Deutschen Juristentages am 16. Januar 2014 in Hannover', <https://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2014/09/140916-Rede-Juristentag.pdf;jsessionid=888C8DF59616C1562875953CC29BC9B1.2_cid371?__blob=publicationFile>, last access: 5 July 2019.

Abbreviations

BArch – Federal Archive (Bundesarchiv)

CDU – Christlich-Demokratische Union Deutschlands

CSU – Christlich-Soziale Union

Drs. – Drucksache

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

FCC – Federal Constitutional Court (Bundesverfassungsgericht)

FCJ – Federal Court of Justice (Bundesgerichtshof)

FDP – Freie Demokratische Partei

GRT – German Reunification Treaty (Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Einigungsvertrag

LAB – Landesarchiv Berlin

NVR – National Defence Council of the GDR (Nationaler Verteidigungsrat)

PA-DBT – Parliamentary Archive Deutscher Bundestag (Parlamentsarchiv Deutscher Bundestag

PDS – Partei des demokratischen Sozialismus

SED – Sozialistische Einheitspartei Deutschlands

SPD – Sozialdemokratische Partei Deutschlands

ZESt – Central Registration Office (Zentrale Erfassungsstelle der Landesjustizverwaltungen)

ZK – Central Committee of the SED (Zentralkommittee der SED)

Acknowledgements

The undertaking of a doctoral degree, the design of a study, the conduct of research, and the process of writing-up cannot be mastered without the fundamental help from colleagues, friends, and teachers.

From the first moment we discussed the topic of the Border Guard Trials, my supervisor Dr Henning Grunwald has been supportive of the project and of the wide angle which this study chose. His academic advice, encouragement, and personal guidance have been essential to this project at every stage. But even more so, Henning has shown abundant empathy at times when my commitment as a father of two took its toll. Professor Sir Christopher Clark has also been helpful in steering this project into the right direction with critical and encouraging remarks during the Research Assessment Exercise after my first year.

When developing research interests, we often follow the leads of our academic teachers. I would like to especially highlight Professor Michael Dreyer at the University of Jena, who has been an inspiring and supportive mentor for over a decade. Without his belief in me, I would neither have received renowned scholarships nor would I have been able to get to know the unique academic experience of Cambridge. Since 2014, Dr Helen Roche was not only a rigorous yet incredibly supportive supervisor but also became a friend and a mentor throughout my academic journey. I owe both of them more than words can capture. During the last year, the journalist Ulrich Suffner offered helpful advice and important opportunities to develop my interest in non-academic writing. Without his gentle and kind promotion, I would not have chosen to start a career in journalism after the PhD.

I want to thank friendly archivists at the Federal Archive in Koblenz and Berlin, at the Landesarchiv Berlin, and at the Parlamentsarchiv des Deutschen Bundestages and the Parlamentsarchiv des Berliner Abgeordnetenhauses.

Likewise, I would like to express my gratitude to many professional library staff who have helped me with countless enquiries, especially in the University Library in Cambridge, in Bielefeld's University Library, in the Deutsche Nationalbibliothek in Frankfurt am Main, and in the Library of the University of Vechta.

Moreover, it is only fair to acknowledge that my academic education would not have been possible without the generous funding that I have received since 2010 from various funding bodies, most notably from the Arts and Humanities Research Council UK, the Cambridge Trust, the Cusanuswerk, and the Studienstiftung des deutschen Volkes. My academic work is a poor repayment for the trust they have placed in me.

Some people have made my five years at the University of Cambridge special. Tomé Gouveia has been a personally inspiring and loving companion, whose friendship is a great honor to me. My dauther Paula is lucky to call him her godfather. Dr Florian Urmetzer has repeatedly prooved that he is the kindest and most welcoming soul on earth, and his unyielding optimism has often benefited me during the past four years. I will never be able to repay his kindness. During the second half of this doctoral programme, Maximilian Schultes has become a wonderful and unique friend and intellectual partner, whose company is always inspiring. Alice Naundorf, though mostly far away, has been an important and decisive person in my life and I can only hope that our friendship will last what I hope are decades to come.

Naturally, I would like to thank my parents for their unwavering faith in me during my studies, for the sheltered childhood that they have given me, and for their great support in many difficult situations throughout the years.

It is with great pleasure that I thank my wife Jenny who is not only the best wife I could have hoped for but a true companion throughout my studies in Jena, Berlin, Nottingham, and Cambridge. She was critical of my work when it was necessary, but much more often supportive beyond reason and beyond measure. Without her support I would not have achieved what I have achieved so far, and this dissertation would have never been written.

Finally, I owe a big thank you to to my daughters Paula Maria and Mathea Elisabeth. With their unconditional love and enthusiasm for creating chaos, they have shed light into the darkest hours of my academic journey, and they have kept me on the ground when I was in danger of flying too high. Their insistence on cuddles, bed time stories, and sharing their observations with me were a constant reminder of what really matters in life, after all.

Cambridge, September 2019 *Philipp Ebert*